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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. ------

CAROLINA POWER AND LIGHT COMPANY, A CORPORATION

Petitioner

vs.

R. R. JERNIGAN, ADMINISTRATOR OF THE ESTATE OF HAYMIE WARREN, DECEASED,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Carolina Power & Light Company, a corporation, hereby respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for the review of its opinion and order filed May 27, 1955, hereto appended, which dismissed petitioner's appeal from an order of District Judge Ashton H. Williams preventing

the taking of depositions sought to be taken by petitioner in order to discover and acquire evidence to be used in support of the allegations of its Petition for Removal at a hearing before District Judge Walter E. Hoffman on respondent's motion to remand; and petitioner respectfully showeth the court:

(a) THE OPINION AND ORDER OF THE COURT OF APPEALS sought to be reviewed has not yet been published in any official or unofficial report, but a copy thereof is appended hereto. The opinion and order of District Judge Ashton H. Williams from which appeal was taken to the Court of Appeals is not published in any publication, but will be found at page 40 of the Appendix to petitioner's brief sent up from the Court of Appeals.

(b) GROUNDS FOR INVOKING JURISDICTION

The petitioner respectfully represents that there are special and important reasons for granting this petition, which among others, are that the Court of Appeals has rendered a decision: *one,* on a question which has not been specifically, but should be, settled by this court; *two,* deciding a federal question concerning the appealability of the order in question in a way which is in conflict with applicable decisions of this court; and *three,* which, in result, sanctions such a departure by the district court from the accepted and usual course of judicial proceedings as to call for the exercise of this court's supervision.

(i) *The opinion* and order of the Court of Appeals sought to be reviewed was decided and entered 27 May, 1955.

(ii) *No petition for rehearing* has been filed and no order granting the time within which to petition for certiorari has been entered.

(iii) *The statutory provision* believed to confer jurisdiction for the review of the decree in question is 28 USC Section 1254(1), reading as follows:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(c) QUESTIONS PRESENTED FOR REVIEW

QUESTION I. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS PETITIONER'S APPEAL ON THE GROUND THAT THE ORDER APPEALED FROM "IS NOT A FINAL ORDER FROM WHICH AN APPEAL LIES"?

QUESTION II. WAS IT ERROR FOR THE COURT OF APPEALS TO FAIL TO ENTERTAIN PETITIONER'S APPEAL ON THE GROUND THAT THE ORDER APPEALED FROM WAS, IN EFFECT, A FAILURE TO DISSOLVE AN INJUNCTION THERETOFORE ISSUED AND IN FORCE, OR WAS, IN EFFECT, THE GRANT OR CONTINUATION OF AN INJUNCTION WHICH, IN EITHER VIEW, MADE IT REVIEWABLE UNDER 28 USC. SECTION 1292?

QUESTION III. IS THE ERROR COMMITTED UNDER QUESTION I, OR UNDER QUESTION II, PREJUDICIAL? IN OTHER WORDS, DOES THE PETITION FOR REMOVAL ALLEGE FACTS, WHICH, IF ESTABLISHED, MAKES THE CASE REMOVABLE?

(d) PROVISIONS OF STATUTES, ETC. INVOLVED

1. Under the view that the order is reviewable as a final order 28 USC Section 1291, is involved reading as follows:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

2. Under the view that the order is appealable as an interlocutory order the provisions of 28 USC Section 1292 is involved reading as follows:

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

3. On other phases certain provisions of the Constitution of the United States and certain codes of South Carolina are involved, as follows:

Provisions of the *Constitution of the United States* reads as follows:

Section 1 of the Fourteenth Amendment reading:

No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of

the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2 of Article IV reading:

* * * The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

Section 2 of Article III reading:

The judicial Power shall extend to all Cases, in Law and Equity * * * To controversies * * * between citizens of different states * * *.

The Fifth Amendment, reading:

No person shall * * * be deprived of life, liberty, or property, without due process of law.

4. *South Carolina Code Laws of 1952,* involved, read as follows:

S. C. Code 1952 Sec. 10-1951:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

S. C. Code 1952 Sec. 10-1952:

Every such action shall be for the benefit of the wife or husband and child or children of the person whose

death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been so caused. *Every such action shall be brought by or in the name of the executor or administrator of such person.* (emp. ad.)

S. C. Code 1952 Sec. 10-207:

Every action must be prosecuted in the name of the real party in interest except as otherwise provided in Sec. 10-208. This section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor or his heirs or legal representatives when the grant is void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

S. C. Code 1952 Sec. 10-208:

An executor or administrator, a trustee of an express trust or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

S. C. Code 1952 Sec. 10-1620:

In an action prosecuted or defended by an executor, administrator, trustee of an express trust or a person expressly authorized by statute costs shall be recovered as in an action by and against a person prosecuting or defending in his own right. But such costs shall be

chargeable only upon or collected of the estate, fund, or party represented unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense.

(e) STATEMENT OF THE CASE AND FACTS MATERIAL TO THE QUESTIONS PRESENTED:

On August 5, 1952 Haymie Warren, a resident of South Carolina, the person for whose alleged wrongful death this action is prosecuted, was engaged with C. C. Weatherford and Cattie Hancock in removing a metal pipe from a water well at the farm home of C. C. Weatherford at Dovesville, a rural community in Darlington County, S. C. In the course of this work the pipe was caused to make contact with the electricity on a power line some 25 or more feet above and 9 or 10 feet to one side of the well, resulting in the death of Warren and the other two persons. Warren was survived by his parents, Elijah Warren and Maggie Bell Warren, residents of Darlington County, South Carolina, who by the wrongful death statute of South Carolina are the sole beneficiaries of any recovery herein. On July 14, 1954 R. R. Jernigan, a resident of North Carolina, *the state of the petitioner's residence,* was appointed administrator of the Estate of Haymie Warren in the probate court of Darlington County, South Carolina. On November 6, 1954 this action was instituted in the Court of Common Pleas in Darlington County, South Carolina, allegedly by said parents, as the statutory beneficiaries, in the name of the administrator, to recover the sum of $200,000 damages for the alleged wrongful death of said Haymie Warren. On November 23, 1954 the petitioner Power Company, a corporation chartered in North Carolina, by petition (Appx. 1) timely filed, removed the action to the United States District Court for the Eastern District of South Carolina on the grounds of diversity of citizenship, al-

leging that the appointment of said nonresident administrator was arranged for and procured by said parents and their attorneys so that they could institute and prosecute this action in his name, as authorized by the South Carolina death statute, as a means of avoiding a diversity of citizenship on the face of the record, and that action was instituted by and is controlled by said resident parents, *the real parties in interest,* in the name of the administrator, but that, contrary to the true facts, they alleged in the complaint that the action was instituted by said administrator for the use and benefit of said parents, as a sham to defeat a removal of the action to the federal court. The case lay dormant in the Federal District Court until it was placed on the preliminary roster of cases to be tried at the March 14, 1955 Florence Term of said Court. At the sounding of the roster of cases for trial at that term on February 16, 1955, counsel for the respondent advised counsel for petitioner and the court that a motion to remand would be filed immediately. Upon receipt of this information petitioner, in order to prepare for the hearing on the proposed motion to remand, proceeding under Rule 26 of The Discovery and Deposition Rules of F.R.C.P. served on respondent on February 17, 1955, notices of the taking of depositions of R. R. Jernigan, Administrator, and of others named. (Appx. 20, 21). On the 18th of February 1955 counsel for appellee filed the announced motion to remand, (Appx. 21, 22), and also filed motions under Rule 30(b), F.R.C.P., (Appx. 26, 28), to permanently stay the taking or to limit the scope of the depositions, etc., and gave notice that the motion to remand would be heard before the District Judge presiding over the Florence Term at 10 o'clock A.M. March 14, 1955 (Judge Hoffman, a District Judge of Virginia, having been assigned to hold that term), and also giving notice that the motion under Rule 30(b) would be heard at 10 o'clock A.M. February 23, 1955 in Charleston, which was one hour prior to the

time set on the same day for taking the depositions in Darlington, 120 miles from Charleston. On February 22, 1955 petitioner was served with a restraining order procured by respondent and issued without notice or hearing by his Honor, Ashton H. Williams, District Judge, dated March 19, 1955, requiring the petitioner to appear before Judge Williams at Chambers in Charleston on 7th March, 1955, only 7 days prior to the date set for the hearing on the motion to remand, then and there to show cause why it should not be *permanently* enjoined and restrained from taking the depositions in question, and also enjoining the taking of said depositions pending the return to said rule. (Appx. 29). Acting on the idea that the restraining order proceeding supplanted the proceeding under Rule 30(b) no appearance was made thereunder by either party before Judge Williams on March 23, nor was any order entered, or applied for, continuing or otherwise dealing with said hearing. The petitioner being thus restrained from proceeding with the taking of said depositions and in order to avoid the consequences of further delays incident to said restraining order, it promptly filed a motion under Rule 65, F.R.C.P. to dissolve the restraining order. (Appx. 33). This motion was heard at the insistence of petitioner on February 26, 1955 before District Judge Ashton H. Williams in Greenville, S. C., and in consequence of said hearing he issued and filed on March 11, 1955 the order appealed from, (Appx. 40), whereby he concluded that the action was not removable,—the motion for remand not being before him—, and declined to rule on the petitioner's motion to dissolve the restraining order, and ordered that petitioner's notices of taking said depositions be *suppressed* "until such time as the court shall have ruled on the plaintiff's motion to remand." The petitioner duly gave notice of appeal from said order on March 12, 1955 (Appx. 45).

On said appeal the Court of Appeals concluded that the order of Judge Williams was not a final order from which an appeal lies, and dismissed the appeal. No ruling was made by the Court of Appeals as to whether the order was of such nature and effect as to be appealable under 28 USC Section 1292 (Injunctions, etc.) It is to secure a review of this order of the Court of Appeals dismissing said appeal that this petition is filed.

(g) JURISDICTION OF COURT OF FIRST INSTANCE

The United States District Court for the Eastern District of South Carolina, the court of first instance, was vested with jurisdiction of this action by virtue of its having been removed under the petitioner's removal proceedings, as stated in (e) above, subject, of course, to later divesting itself of jurisdiction on a hearing in the usual course of a motion to remand.

(h) ARGUMENT AMPLIFYING REASONS FOR WRIT

The right to have a case removed from a state court to a federal court, if the case is removable, is a valuable right. Therefore, the right to use the established rules and procedures of the court to prepare for a fair hearing on the question of removability is also a valuable right. The framers of the Constitution in their wisdom foresaw the injustices which would likely be suffered by a person required to litigate his rights in the courts of a state of which he was not a citizen, and as a guarantee against such injustice they extended the jurisdiction of the Federal Judiciary to include controversies between citizens of different states. (Sec. 2, Art. 3). For like reasons Congress implemented this constitutional grant by providing for the institution of suits in the federal courts in the first instance,

and for the removal of cases from state courts to federal courts, on grounds of diversity of citizenship. *Chicago, Etc. R.R. Co. v. Whitton* 13 Wall. 270, 20 L. Ed. 571. History has verified the wisdom of those who thus safeguarded such right. Later the Congress, evidently more intent on minimizing delays and to reduce the work of the courts occasioned by appeals arising from questions of removability than in safeguarding this constitutional right of nonresidents to trial in Federal courts, enacted a statute which abolished the right to a review of an order remanding a case back to the state court from which it was removed. (28 USC Section 1447(d)). This resulted in the ruling of a district judge who grants a motion to remand being final and unreviewable, regardless of how unjustly it may deprive a citizen of this constitutional protection. It also resulted in making the order of a judge which prevents the use of the deposition and discovery procedure contained in the Federal Rules of Civil Procedure as a means of obtaining evidence for use at the hearing on a motion to remand *final and irreparable,* as does the order appealed from in this case, unless corrected by review. However, Congress did not disturb the previously existing right of the other party to have an order *denying* a motion to remand reviewed; nor did it disturb the right to a review of an order dismissing an action improperly brought in a federal court on grounds of diversity of citizenship. It is not our purpose here to advance or to evaluate reasons for this patent inequality between litigants in respect to the trial of cases in federal courts, for such seems to be regarded as within the province of Congress to so provide. We do say, however, that the fact that a litigant's right to have an *order of remand* reviewed having been thus singled out and taken away, makes it all the more important and compelling that the courts of review exercise the utmost care in reviewing and supervising proceedings in district courts which hamper

a litigant in his preparation for hearing on a motion to remand. Therefore, any order of a district judge which interferes with the litigant, who petitioned for the removal, in his steps necessary to preparing for and getting a full and fair hearing and consideration on the question of removability under a motion to remand ought not to go unreviewed.

It must be remembered that 28 USC, Section 1447(d) preventing a review applies *only* to orders of remand and does not apply to orders which involve steps in preparation for the hearing on the motion for remand. Due process of law contemplated in the Constitution requires that every person have a fair and full opportunity to present his cause on his day in court on any question of right. He apparently may be denied the right of appeal from the order which issues out of the hearing, but he is not to be denied the right of appeal from any order which prevents his use of the usual and orderly processes provided by law or usage in preparing for and getting a fair hearing.

If this court denies this petition then the hearing on the pending motion for remand before Judge Hoffman will be a mere formality, so far as petitioner is concerned, with the issuance of an order of remand being inevitable and foretellable in advance. The petitioner is entitled to Judge Hoffman's opinion as to removability, yet should Judge Hoffman be of the opinion that the grounds alleged in the removal petition are sufficient to make the case removable, he will, nevertheless, be compelled to remand the case because of two situations created by Judge Williams' order, as follows:

First. Judge Williams, another district judge, has already ruled,—not on a hearing by him of the motion to remand but on a matter involving a mere step in preparation for a hearing on the motion to remand,—that

the case is not removable. Having no power to review and overrule another judge of equal dignity, or to rule again on a question already ruled on by another judge in the same case, the unreversed ruling of Judge Williams will have become the law of the case on the question of its not being removable, leaving Judge Hoffman no recourse but to order the case remanded as a matter of mere formality. We can think of no more confounding and prejudicial thing in the judicial process than a situation which would permit one judge to substitute his own judgment for, or to anticipate the judgment of, another judge in respect to a matter which in orderly and customary procedure belongs to the latter judge for decision. Such would be the essence of denial of due process.

Second. Or, if not bound by Judge Williams' ruling, Judge Hoffman would, nevertheless, be compelled to remand the case because of the failure of the petitioner to carry its burden of establishing at the hearing the controverted facts alleged in the petition for removal, which failure would, of course, be attributable to the order of Judge Williams which prevented until after "the court shall have ruled on the plaintiff's motion to remand" the use of the machinery of the court to discover and acquire the evidence for that purpose.

Caught in the jaws of a situation thus created, the petitioner will be compelled to stand helpless as it sees its day in court on the question of removability go by, never to return, because the order of remand, even though granted under such circumstances, is positively precluded by statute from being reviewed.

No decisions have been found which pass upon the propriety of such an order, or of such procedure, or which deals with the reviewability of such an order or procedure. Hence, it is urged that the rights here involved are of such great importance as to merit a review by this court.

There are decisions of this court which establish principles applicable, by analogy, to this case which it is contended clearly make this order reviewable as a final order under 28 USC Section 1291, also as an interlocutory order under 28 USC Sec. 1292. Hence, the decision and order of the Court of Appeals sought to be reviewed is in conflict therewith. The decisions to which we refer will be listed in the discussions of Question I and Question II which are to follow.

Then there is the further reason for granting the writ, in that a failure to do so would result in this court *sanctioning* what petitioner contends is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

It is an accepted fact that the adoption of Federal Rules of Civil Procedure has led the way in changing former methods of establishing truth from a game of manipulation to simple, direct, economical, and effective methods. Probably the most important element in this accomplishment is that provided by the liberal rules of discovery and deposition which provide a short cut method of doing what formerly had to be done by a bill of discovery. And, the philosophy of judicial decision has been toward liberal construction and use of these rules, so much so that very few forms of factual knowledge touching upon a right involved may not be readily discovered and acquired by an adverse party.

Hearing on a motion for remand constitutes the accepted and usual method for determining the right of removal, both as to the legal sufficiency of the facts alleged and also as to the truth of such facts. Both of these questions are for the determination of the judge before whom the motion for remand is to be heard. A determination of them by any other judge, particularly on a mere question

of taking depositions to establish the facts alleged, is a radical departure from the accepted and usual course of judicial proceedings, and if sanctioned by the courts of review will constitute the source of great injustice, particularly so in view of the fact that there is no appeal from an order of remand.

In *Pirnie v. Andrews (D. C., N. Y., 1939)* 1 F. R.D. 252, it was held that a motion for an order requiring a plaintiff to appear for the taking of his deposition under prior notice given could not be denied on the ground that the federal court had no jurisdiction of the action, *since the proper method for determining lack of jurisdiction is by motion to remand.* That is sound reasoning and is based upon the contention here made that the accepted and usual course of judicial process is to determine removability upon a motion to remand and not upon a motion before another judge to stay the taking of a deposition for discovering and procuring evidence to be offered at the hearing on the motion to remand.

Judge Williams found and ruled that "in order to determine these motions it is necessary that I consider the issues raised by the plaintiff's motion to remand and *it is only because the motion to remand has been set before the Presiding Judge* of the United States District Court for the Eastern District of South Carolina, Florence Division, *that I, do not decide the motion to remand."* (Appx. 42.) The Judge then indulges in an extensive discussion of the law of removability, and further adjudges *"It, therefore, appears to the satisfaction of the court that the action is one which is not removable,* and that, therefore, the motion of the plaintiff to stay the taking of the depositions should be granted until such time as the plaintiff's motion has been decided. Having taken this view, it is not necessary at this time to pass upon * * * the propriety of the Court in issuing its order of February 21, 1955, as raised by the de-

fendant's motion to dissolve the temporary restraining order. However, I might add parenthetically that the Court is of the opinion that it has full authority under Rule 30(b) to make any order which justice requires to protect the parties or witnesses from annoyance, embarrassment, or oppression."

Thus it is obvious that Judge Williams knew that the very question he ruled on was in the sole province of Judge Hoffman, but, nevertheless, he adjudicated the law of removability out of turn. He mentioned "parenthetically" that he had the right as justice required to protect the parties and witnesses from "annoyance, embarrassment and oppression." But he did not base his order on that ground, nor were any facts alleged, shown, or found which would justify interference on that ground. Hence, this order is not to be treated as one based on discretion of Judge Williams. But if it should be so regarded, it is an unlawful discretion. Lawful discretion cannot be based upon an erroneous conclusion of law.

With these important reasons for the grant of a review, the specific questions involved will be next discussed.

QUESTIONS DISCUSSED

QUESTION I. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS PETITIONER'S APPEAL ON THE GROUND THAT THE ORDER APPEALED FROM "IS NOT A FINAL ORDER FROM WHICH AN APPEAL LIES" TO THE COURT OF APPEALS?

There is a line of decisions which hold that orders, other than orders or decrees finally terminating the main controversy in an action, are reviewable on appeal or certiorari when such orders have a *final* and *irreparable effect*

upon a substantial right which arises incidental to, but is not as an ingredient of, the main controversy.

Cohen v. Beneficial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528.

Cobbledick v. United States, 309 U. S. 323, 60 S. Ct. 540, 84 L. Ed. 783.

Arnold v. United States, 263 U. S. 427, 44 S. Ct. 144, 68 L. Ed. 371.

Stack v. Boyle, 342 U. S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (7, 10).

Swift Company v. Compania Colombiana, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206.

Collins v. Miller, 198 F (2) 948 (949).

Henderson v. Richardson Co., 25 F (2) 225.

Republic Natural Gas. Co. v. Oklahoma, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212.

United States v. River Rouge Imp. Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339.

Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

Cohen v. Beneficial Loan Corp., supra (337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528) applies the principle in a manner which leaves no doubt about its application to the order under examination here. Mr. Justice Jackson refers to 28 USC Section 1292, as he says, to show the purpose of Congress "to allow appeals from orders other than final judgments *when they have a final and irreparable effect on the rights of the parties.*" (emp. ad.)

In that case the appeal was from an order of the district judge denying the defendant's motion to require plaintiff to post security for costs. The order was based on the

judge's conclusion that a statute of the State of New Jersey, which required the plaintiff to secure the costs in an action of that nature, did not apply where the action was instituted in the Federal court. The Supreme Court held that the question of the right to have the costs secured under the State statute was a right separable from, and collateral to, the main relief sought in the action, and since the ruling thereon could not be later reviewed on an appeal from a final judgment on the merits so as to prevent irreparable consequences that it was appealable under 28 USC Section 1291. In that opinion statements applicable to the question here are as follows:

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished, or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps toward final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeny, 1 Pet (US) 567, 569, 7 L. Ed. 265, 266; United States v. River Rouge Improv. Co. 269, U. S. 411, 414, 70 L. Ed. 339, 343, 46 S. Ct. 144; Cobbledick v. United States, 309 US 323, 328, 84 L. Ed. 783, 786, 60 S. Ct. 540.

We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

In *Cobbledick v. United States,* supra, (309 U. S. 323, 60 S. Ct. 540, 84 L. Ed. 783) Mr. Justice Frankfurter speaking for the court keeps an eye to the principle, using this language:

Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only where observance of it *would practically defeat the right of any review at all.* (Emp. ad.).

In *Republic Natural Gas Company v. Oklahoma,* supra, (334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212) Mr. Justice Frankfurter recognizes the principle, not only as necessary to safeguard the right of a litigant in a particular instance, but also as a means providing a smooth functioning judicial system. He says:

No self-enforcing formula defining when a judgment is "final" can be devised. Tests have been indicated

which are helpful in giving direction and emphasis to decision from case to case. * * * There have been instances where the court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing. * * * One thing is clear. The considerations that determine finality are not abstractions but have reference to very real interests—*not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system.* (Emp. ad.)

United States v. River Rouge Improv. Co. supra, (269 U. S. 411, 70 L. Ed. 339) says:

> While the general rule requires that a judgment of a Federal Court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter *distinct from the general subject of the litigation* and affecting only parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation (authorities omitted and emp. added)

Trustees v. Greenough, supra, (105 U. S. 527, 26 L. Ed. 1157) in respect to a decree ordering costs paid out of a trust fund in the hands of the court says:

> They (the orders) are, certainly, a final determination of the particular matter arising upon the complainants' petition for allowances * * *. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.

If the nature and effect of the order here appealed from is such as to bring it within the principle running through

the foregoing decisions, and undoubtedly it is, then it is reviewable under the concept of its being a final order, and the decision of the Court of Appeals to the contrary is in erroneous conflict with these cited decisions.

The question of the right to take depositions for use on the hearing of a motion to remand is not an ingredient of the main controversy and is, therefore, reviewable under the foregoing authorities. Taking the depositions after the hearing will be too late in that the failure to have the benefit of the evidence thus sought at the hearing will result in the issuance of an order of remand for lack of proof of the facts alleged, from which there is no appeal, thereby inflicting final and irreparable injury in the form of the loss of the valuable right of removal.

Furthermore, the order is ruinous in a final and irreparable way because judges of equal dignity are not permitted in our judicial system to decide questions of law differently in the same case. Judge Williams' ruling that the allegations of the removal petition do not make the case removable as a matter of law will be *res judicata*, or will at least constitute the law of the case, on that question if allowed to stand and will be binding on Judge Hoffman, compelling him to remand the case.

It is difficult to conceive of a situation involving a right more completely collateral to the basic controversy, or one more final and irreparable in its consequences, than is the right involved in the Williams' order. It is appealable as a final order.

CASES CITED BY COURT OF APPEALS DISTINGUISHED

An examination of the cases cited in the opinion of the Court of Appeals as authority for dismissing petitioner's appeal will show that they are clearly distinguishable. They

deal with orders wholly unrelated to the question involved in the order in this case.

In none of those cases was the question of establishing the jurisdiction of the Federal court at issue. They only involved the question of appellate jurisdiction to review certain orders held not final. Those cases remained in the Federal courts so that, upon the rendition of a final decree therein terminating the main controversy, the appealed orders which were held to be unappealable because they were interlocutory in nature, could be reviewed along with and as part of the final decree. In our case the order, if not reviewed now can never be reviewed in a Federal court, where petitioner claims the right to litigate the main controversy, because it will result in a remand from which there is no appeal; nor can there be any consideration of the error in this order by the state court. Since this characteristic distinguishes those cases from this one, there is no need to analyze them in detail.

QUESTION II. WAS IT ERROR FOR THE COURT OF APPEALS TO FAIL TO ENTERTAIN PETITIONER'S APPEAL ON THE GROUND THAT THE ORDER APPEALED FROM WAS, IN EFFECT, A FAILURE TO DISSOLVE AN INJUNCTION THERETOFORE ISSUED AND IN FORCE, OR WAS, IN EFFECT, THE GRANT OR CONTINUATION OF AN INJUNCTION WHICH, IN EITHER VIEW, MADE IT REVIEWABLE UNDER 28 USC SECTION 1292?

This question calls for a consideration of the appealability of the order under 28 USC Section 1292 under the view that it failed to dissolve an existing injunction, or in effect, it amounted to the grant or continuation of an injunction.

The refusal of the district judge to rule on the motion to dissolve the temporary restraining order and the basing of his order on Rule 30(b) F.R.C.P. has significant consequences, not only as to appealability, but also in respect to its being an unwarranted departure from accepted and usual practice and procedure in the courts, necessitating supervision of this court and, also, as to whether it amounts to an infringement of the due process clause of the Federal Constitution.

In the case of *Baltimore Contractors v. Bodinger,* 348 U. S. 176,-- S. Ct., -- , 99 L. Ed. 171, cited in the opinion of the Court of Appeals, as authority for dismissing the appeal, (but which petitioner claims is an authority for entertaining the appeal), Mr. Justice Reed, for the purpose of determining appealability, clearly points out the distinction between an order which is issued in the process of administering equitable relief in the form of staying proceedings in a law action and one entered in a law action merely in the exercise of the inherent power of the court to determine "how to try the case." He cites the line of cases represented by the opinion in the case of *Enelow v. New York Life Ins. Co.,* 293 U. S. 379, 79 L. Ed. 440, 55 S. Ct. 310 as authorizing an appeal under 28 USC Section 1292 when the order is issued in the process of administering the equitable remedy of staying proceedings in a law action on the one hand, and, on the other hand, he cites that line of decisions represented by the opinion in *Morgantown v. Royal Ins. Co.,* 337 U. S. 254, 93 L. Ed. 1347, 69 S. Ct. 1067, as precluding an appeal under said section when the stay is ordered merely in the exercise of the inherent power of the court to determine "how to try the case."

Petitioner contends that the order here appealed from was not an order issued to determine "how to try the case". The issue of removability was not to be tried before the

judge who issued the order, but before another judge. He had no power, inherent or otherwise, to determine how that issue was to be tried by another judge. It is true that the respondent first filed a motion to stay, or otherwise alter, the taking of the depositions under Rule 30(b), the legal effect of which will be discussed later, and notice of hearing thereon before Judge Williams had been given, but that would not serve to vest him with authority to decide that Judge Hoffman should rule on the motion for remand without also having before him the evidence intended to be offered by means of these depositions. The thing which interrupted the taking of the depositions according to the notice, and in time to have them available for the hearing on the motion for remand, was the service on petitioner on February 22, of the temporary restraining order and the rule to show cause, dated February 19, 1955, issued by Judge Williams without notice or hearing.

That restraining order proceeding was a proceeding in equity whereby the court was administering equitable relief in the form of discovery for use in a law action. The fact that it was issued upon respondent's application made in a law action, instead of by separate bill in equity, is of no consequence here because modern rules of procedure,—first by old Equity Rule 58 and later by Rule 26, et seq., F.R.C.P. —, abolished the old practice of bills in equity to obtain discovery and also authorized the administration of all forms of relief in one action to be known as a "Civil Action." (FRCP, 2).

This restraining order required the petitioner to show cause why the defendant (petitioner) should not be *permanently* enjoined and restrained from taking the depositions in question, and restrained the petitioner from taking said depositions pending the return of the rule. (Appx. 29). Except for this restraint the depositions could

and would have been taken at the time set on February 23rd. The petitioner moved to dissolve this restraining order, (Appx. 33), which motion was heard on February 26, 1955 (Order Appx. 42). The order appealed from issued out of that hearing was filed March 11, 1955, and recites that at such hearing the respondent's motion for stay under Rule 30(b) was also heard; (Appx. 40). It also states that the hearing Judge *declined to rule on the restraining order* which had been employed under his hand to prevent the taking of the depositions, left it suspended in the air, and shifted over to the motion under Rule 30(b) and entered the order which continued to prevent the taking of said depositions by means of suppressing the notice. This procedure is not only unusual but it is very significant in ultimate effect on this petitioner's rights, should it be held that no right of appeal lies because the ruling and order was made under Rule 30(b) instead of in the injunction proceeding (and it is contended that it should not be so held). If such should turn out to be of consequence, it is urged that it is neither legitimate nor customary procedure for a court to employ and abandon the remedy of equitable injunction with such nonchalance. It cannot in justice be employed at one moment for a specific purpose and then upon a hearing to test its legality be ignored and abandoned in favor of a method, believed to be unappealable, for accomplishing the same end.

But an even more decisive reason for the order being appealable under 28 USC Section 1292 is that *discovery* provided by the Federal Rules of Civil Procedure is, and has ever been, an equitable remedy. It was an incident of every action in equity, and was made available to parties in actions cognizant at law by means of a bill in equity seeking no relief other than discovery of facts for use in the law action. This ancient, awkward, expensive, but effective means of obtaining discovery has in modern times

been streamlined by supplanting statutory methods, and by rules formulated under statutory authority, for summary examination of parties and persons, by deposition, interrogatories, etc. It is said that "It is a commonplace that prior to 1912 when Federal Equity Rules, including Rule 58, were adopted, the only available method of obtaining information from an adversary was the bill of discovery". (Historical Note. 1 to Rule 26 of Federal Rules of Civil Procedure, USCA—Volume containing annotated Rules 17 to 51, page 173.)

The entire deposition proceeding which petitioner was using was in the exercise of the equitable remedy of discovery pursuant to the method prescribed therefor under the heading of "Deposition and Discovery" contained in the Federal Rules of Civil Procedure (Rule 26 et seq), in lieu of the former method of a bill in equity. Rule 30(b) is a part of that series of rules. Therefore the order issued pursuant to a motion made under Rule 30(b) was of necessity issued in respect to the administration of an equitable remedy, and it comes within that class of stay orders held in the Bodinger Case to be appealable as an interlocutory order under 28 U.S.C. 1292. Therefore, the Court of Appeals unquestionably erred in its refusal to entertain the petitioner's appeal.

QUESTION III. IS THE ERROR COMMITTED UNDER QUESTION I OR UNDER QUESTION II PREJUDICIAL? IN OTHER WORDS, DOES THE PETITION FOR REMOVAL ALLEGE FACTS WHICH, IF TRUE, MAKE THE CASE REMOVABLE?

It is conceded that if the allegations of the petition for removal are not sufficient in law to authorize a removal then the error in the order appealed from is harmless, and that the error of the Court of Appeals in dismissing the

appeal is also harmless. *Therefore, the question is squarely presented to this court to determine if a right of removability is alleged which will be lost unless protected by the appeal.* And, of course, for this purpose all facts alleged in the removal petition will be treated as true.

Judge Williams based his order on the conclusion that the case of *Mecom v. Fitzsimmons Drilling Company,* 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233 controls to make this case not removable.

Petitioner contends that removability was sufficiently alleged on two grounds, viz:

A. The facts alleged and the state statutes involved are distinguishable from those of the Mecom case thereby making that case inapplicable; and

B. Mecom's case rests on unsound principles and this court should re-examine and overrule or modify it.

A. Differences in facts and statutes makes Mecom's case inapplicable.

The decision in the Mecom case is based upon the premise that the *residence of the real parties in interest control on the question of removability.* That is evident from the use of this language:

> The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, *as here,* charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, *he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction.* This we think is the correct view. The applicable statutes made the administrator the

trustee of an express trust *and require the suit to be brought and controlled by him.* (Emp. ad.)

There is a grave question in our minds, which is discussed separately below, as to whether the provisions of a state statute requiring the action to be brought by a person whose residence would eliminate diversity of citizenship can have any binding effect on a Federal court in determining its jurisdiction, for the reason that if the denial of removability is made to turn on that point then a citizen's privilege, guaranteed by Article III, Section 2, of the Constitution, of having his controversy with a citizen of a different state tried in a court of Federal jurisdiction would be abridged by the provisions of a state law contrary to the provisions of Section 1 of the Fourteenth Amendment.

However, without admitting the propriety of the Court resting its decision in Mecom's case on the *requirement* of the Oklahoma statute that the administrator bring the action, we will treat it as a valid requirement, *arguendo,* for the purpose of showing that our case is distinguishable from Mecom's case because the South Carolina Statute provides differently.

The Mecom opinion says "The applicable statutes made the administrator the trustee of an express trust and *require* the suit to be *brought and controlled* by him." (Emp. ad.)

The South Carolina Statute provides:

"Every such action shall be brought *by or in the name of* the executor or administrator of such person." (Emp. ad.), S. C. Code Laws 1952 Sec. 10-1952.

The rules for construing statutes say that it is presumed that the legislature acted with deliberation, with knowledge of the effect of its act and with a purpose in view, and that it intended that the words and phrases employed were used with their ordinary and common meaning. In the light of

such presumptions it must be readily conceded that there can be no sensible meaning given to the words, "or in the name of", other than that it was intended to provide alternative methods of enforcing the remedy, one by authorizing the administrator to sue, and the other, by authorizing some one other than the administrator to sue in the administrator's name.

The South Carolina death statute (Code Sec. 10-1952) designates the surviving parents, as sole beneficiaries. So, if anybody has the alternative right to sue in the administrator's name, certainly in this case it would be the surviving parents who are sole owners of the proceeds.

The South Carolina Code, Sec. 10-207, provides that "every action *must* be prosecuted in the name of the *real party in interest* except as otherwise provided in Sec. 10-208." (Emp. ad.)

Section 10-208, S. C. Code, above referred to, provides "an executor or administrator, a trustee of an express trust or persons expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted."

The only permissible construction to place on these sections of the South Carolina Code, construed in *pari materia* with other sections, is that every action must be prosecuted by the real parties in interest, except that in those cases where an administrator or statutory trustee is empowered by statute to sue he may do so without joining with him the "real parties in interest", and, in actions for wrongful death, *the statutory beneficiaries, being the real parties in interest,* they may themselves sue in the name of the administrator of the deceased. The reason for the necessity or desire on the part of the beneficiaries to sue is not stated, and is not important. Evidently it meant to give a right to sue without regard to a necessity arising from a refusal

of the administrator to sue, otherwise it would have been so limited.

In *Kitchen v. Southern Ry. Co.*, 68 S. C. 554, 48 S. E. 4, the South Carolina Supreme Court held that a complaint in an action for wrongful death by an administrator is demurrable where it fails to designate the beneficiaries for whom he sues. We see no reason for this holding, except for the fact that the right to the recovery being in specifically designated statutory beneficiaries, that they are recognized as *the real parties in interest,* though some one else is authorized for ministerial purposes to sue for them, and that because all actions must be in the names of the real parties in interest, except in suits by administrators, etc., it is necessary that the names of the *real parties in interest* (the beneficiaries) be alleged in the complaint in order that it may affirmatively show on the record that the suit, maintained by one who is not *the real party in interest,* comes within the authorized exception.

Another indication that the beneficiaries rather than the administrator are regarded as the real parties in interest, is found in South Carolina Code Sec. 10-1620 which provides that in an action by an administrator or trustee of an express trust the court costs shall be "chargeable only upon or collected by the estate, fund, or *party represented* unless the court shall direct the same to be paid by the plaintiff or defendant for mismanagement or bad faith in such action or defense."

If in this case there is no recovery then the costs may be taxed against the parents, as the "parties represented". Costs could not be taxed against the administrator in person except by special order on a finding of bad faith or mismanagement,—a thing which could not happen in this case if the statutory beneficiaries brought and are prosecuting and controlling the action in the name of the administrator,

as is alleged in the removal petition. No one would ever contend that it is mismanagement or bad faith for an administrator to allow the statutory beneficiaries to employ lawyers and handle the litigation to recover their own damages in his name, regardless of the interpretation of the statute. Nor would any one ever be able to successfully contend that in such case the administrator could be liable on his bond for failure to act with diligence or fidelity. If the beneficiaries are in control of the action the administrator could not be charged with responsibility for its conduct, or for its settlement or the distribution of or accounting for proceeds which the beneficiaries collect or recover themselves. The sole beneficiaries and their counsel would handle all such matters. In case of neglect or wrongdoing to the injury of the beneficiaries it would be their act and they would be estopped to complain or to proceed against the administrator for the consequences of their own dereliction.

Therefore, when the reasons assigned in the Mecom case for holding an administrator under Oklahoma law and the facts of that case to be the *real parties in interest* are examined, in light of South Carolina law and the facts alleged in the removal petition in this case it is found that the reasons in the Mecom case cannot apply to make this case unremovable.

There is no case, as far as we can find, in which the South Carolina Supreme Court, with the question directly in point, has construed the words "by or in the name of the executor or administrator of such person" precludes the statutory beneficiaries from instituting, prosecuting, and controlling an action for wrongful death "in the name of" the administrator. Of course, there must be a personal representative before anyone can sue in his name.

Should it be contended by respondent that the case of *In Re Mayo's Estate,* 60 S. C. 401, 38 S. E. 634, held that

a death action *must* be prosecuted by the personal representative, petitioner replies that an examination shows that it is not an authority for any such proposition. Mayo, who was a resident of Florida, was killed in Florence County, South Carolina, by the alleged negligence of the Northeastern Railroad Company. The administrator, McCown, was appointed in Florence County and brought suit in South Carolina against the Railroad Company to recover damages, and a proceeding was instituted by said Railroad Company to revoke the letters of administration on the ground that Mayo was a nonresident and left no property or estate in South Carolina to be administered. Two questions were decided: One was that the Railroad Company had no such interest as authorized it to attack the original proceedings in the probate court appointing the administrator. The other was that the cause of action for wrongful death under the South Carolina death statute is a sufficient ground for appointment of an administrator of a non-resident who left no general property in the state to be administered. In the course of the opinion reaching decision of these two questions the court said: "We, therefore, hold that the statute creating a right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court in the county where the intestate was killed in granting administration for the purpose of enforcing such right of action."

Thus the language "cannot be enforced except by the administrator" was undoubtedly used with no idea of holding that it could not be enforced by the beneficiaries in the name of the administrator under the provisions of the death statute for suit in the name of the administrator. Such question was not before it, and never has been. It was not necessary to the decision of the questions before

the court to so hold. All that case really held was that there must be an administrator in order for the action to be maintained whether by him or by the beneficiaries in his name. Petitioner's contention is that once the administrator is appointed the statutory beneficiaries may then prosecute the action in his name, and that the administrator in this case under review was appointed for that purpose, and a person of the same residence as petitioner was chosen by, and appointed at the instance of, the beneficiaries in order that they might sue in his name.

Nor do we think that *Boyd v. Ritchie*, 159 S. C. 55, 155 S. E. 844, cited in Judge Williams' order is an authority on this point. There the widow sued and recovered in her capacity as administratrix. Certainly she had the authority to do so, and since there was nothing to indicate that she sued individually as beneficiary, in her name as administratrix, of course, it must be treated as a recovery by her as administratrix. Having recovered as administratrix she was necessarily bound to account for the recovery as administratrix. What was decided was that her bond was liable. The court didn't even mention in its opinion the words "or in the name of". Hence it cannot be held to be a specific interpretation of that language.

There is no special virtue in the office of administrator that should keep the court from giving ordinary meaning to the words "or in the name of." Indeed, Mayo's case says the legislature "could as well have imposed the duty on the sheriff or the coroner."

The recent case of *Bailes v. Southern Ry. Co., et., al.*, __S. C.__, filed 5-11-55, (so far published only in 87 S. E. 2nd 481, adv. sheets 6-23-55,) permitted a widow to sue for damages for wrongful death when the administrator refused to sue. This ruling refutes any contention that the action *must* be prosecuted by the administrator, or the

wrong go unredressed. If the challenged mandate of the statute is not binding in the case of fraud, it should not be binding in the case of an alleged manipulation to defeat a removal.

B. Mecom's case rests on unsound principles and this court should re-examine and overrule or modify it.

It is respectfully, but seriously, urged upon the court that the opinion in the Mecom case is not supported by *reason* or by *authority,* and so long as it remains in the books as an authority it will constitute an unsafe guide to District Judges in issuing orders of remand from which there is no appeal, and thereby work irreparable harm to non-resident defendants in respect to removal rights in death actions in states where a non-resident may be appointed as an administrator. Judges are justifiably conscious of the duty to make their orders follow decisions of this court. Lawyers never fail to chart the course of their cases so as to reap the benefits of the advantages derived from trial in local state courts. This diligence on their part is no criticism of them, but it confirms the existence of the injustices suffered by non-resident defendants in trials in state courts, which were intended to be obviated by the provisions in the Constitution and the laws enacted for removal to Federal courts.

The *reasoning* stated in Mecom's case for holding that the duties of an administrator in a death action are such as to constitute him the *real party in interest,*—making his residence control on removability—are not impressive; especially when weighed against the injurious results to a non-resident in the loss of his valuable right to defend in a court of Federal jurisdiction.

One must concede that the basic reason for the Constitution having extended Federal jurisdiction to contro-

versies between citizens of different states and for the enactment by Congress of the statute providing for removal of a case from a state court to a Federal court solely on the grounds of diversity of citizenship was in the furtherance of justice by sparing the non-resident party from the injustices which result from local prejudices and influences. *Chicago, Etc., R. R. Co. v. Whitton,* supra (13 Wall. 270, 20 L. Ed. 571). This right is even more specifically limited to that purpose now since *Erie Railroad v. Thompkins,* 304 U. S. 64, 82 L. Ed. 1188, eliminated advantages once existing in Federal courts due to variation in judicial interpretation of principles of law applicable to the controversy.

The practical results of a situation should never be overlooked. So take the case at hand and consider the result if Mecom's case controls. If Haymie Warren, a resident of South Carolina, had survived his injury an action by him against the petitioner brought in the state court to recover damages would unquestionably be removable, and petitioner would by such removal be saved from the injustices of the presumed local prejudices and influences. But, because he died, giving rise to a cause of action for damages growing out of the same transaction, created for the sole benefit of his resident parents; and because the South Carolina statute provides that the action to enforce such claim be by or in the name of his administrator instead of by the resident beneficiaries: and because under South Carolina law a non-resident may be appointed as administrator of his estate; and because of the opinion of this court in the Mecom case, if it applies; the petitioner must be subjected to the injustices of local prejudices and influences which were intended to be obviated by the Constitution and the removal statutes enacted to give it effect.

One would hardly say, or contend, that with the parents as sole beneficiaries that this action conducted by the non-

resident administrator, and tried in the state court in the very county of the residence of them and of their deceased son, Haymie Warren, would not subject the petitioner to the same sympathies, prejudices, and influences as it would be subjected to if the suit were in their name and openly conducted by them. They know this, else there is no explanation for the trouble of going to North Carolina, the state of the petitioner's residence, for an administrator, when the appointment of one of the parents, or of a local citizen, would be more logical and more convenient.

There is nothing in the Constitution or in the removal statute which indicates an intention to subject a non-resident to the hazards of the injustices attendant on trials in local courts upon the happening of such fortuitous circumstances as have combined to that end in this case. Therefore, if the right of removal is lost, it is because of judicial interpretation made apparently with more regard for technical considerations than for practical results, and not because of constitutional or legislative intent or omission.

Authoritywise, the Mecom opinion is based on a long line of opinions of this court beginning in the early days with such as *Childress v. Emory,* 8 Wheat, 642, 5 L. Ed. 705, holding that in actions by or against administrators involving *assets* of the decedent's estate that the residence of the administrator controls on questions determining Federal jurisdiction based upon grounds of diversity of citizenship. Such cases differentiated administrator actions from other situations where the suit by statutory provision had to be prosecuted in the name of a governor, or a state, or a sheriff, who were held to be merely nominal parties with the ultimate recipients of the recovery as the real parties in interest.

That basis for such differentiation is not too convincing even in an action of that sort. But if the court finds it to be in the interest of justice to let that line of decision stand

in that type of case, it still does not justify the consequences of Mecom's case. So far as we can find in no case, prior to or since Mecom's case, was the residence of the administrator involved on the question of removal of a death action; and, presumably, we never will find another such case so long as District Judges follow it as precedent and defendants are prevented from appealing orders of remand. *There is no way, unless this petition serves the purpose, to again get this question before this court for re-consideration.*

A differentiation between the nature of the duties of administrators in actions for wrongful death and in actions involving assets of the estate has been generally recognized. See *Bennett v. Spartanburg Railway Gas & Elec. Co.*, 97 S. C. 27, 81 S. E. 189, and *Holt v. Middlebrook*, (4th. Cir.) 214 F. 2nd. 187. Many other cases could be cited to the same effect.

Without going into all the reasons which could be assigned for holding the administrator to be the *real party in interest* in cases involving assets of the estate as against that of his being a *mere nominal party* in death actions, we desire to point out that the estate of a deceased person is a legal entity vested by law in the administrator, and is capable of suing by, and being sued in the name of, the administrator in respect to any matter involving a right or liability arising from an act of the decedent occurring before death or in respect to any act of the administrator on behalf of the estate occurring after his appointment. The many and varied interests of divers persons in the assets of the estate, such as creditors and heirs-at-law, devisees, dower interests and the like, make it impossible to specify all persons whose interests may be affected in any particular action. These interests arise from legal principles which have no relation to the creation of the assets. But not so in case of an action for wrongful death. There the bene-

ficiaries are specified by the statute which creates for them the right of the recovery. Their identity is easily ascertained, and in fact, they must be specifically named in the complaint or it is demurrable. *Kitchen v. Southern Ry. Co.*, 68 S. C. 554, 48 S. E. 4. Also the right of recovery is created solely to compensate them for *their loss* sustained. The recovery may even include compensation for their wounded feelings as well as for the loss of the benefits of the decedent's earning capacity. *In Re Mayo's Estate,* supra. Their interest is personal to them, and springs solely from the statute which created the right for them alone and does not arise out of the law of inheritance or general principles of law.

Mecom's case says that the administrator's duties are such as to make him the *real party in interest* in that the administrator is "charged with responsibility for the conduct or settlement of the suit and the distribution of its proceeds to persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity." Putting these reasons to one side, there would seem to be no other basis to support the decision. But, granting, *arguendo,* that these duties do exist (however, they are not admitted to exist in this case) what is there about them which would cause the administrator's residence to be an important factor in their performance? Does the fact that his residence is the same as that of the non-resident defendant any the better enable him to perform those duties by litigating the action in a state court than in a federal court,—likely to be sitting only a block away? He can certainly be as diligent in prosecuting or settling the action in the federal court as he can in the state court regardless of the state of his residence. He can be just as faithful to his trust in distributing funds recovered in a federal court as he can in respect to funds recovered in a state court. In either event he will have to leave his home

in the state of his and the defendant's residence in order to attend trial in the state of the forum, whether it be in a state or a federal court. But he knows this when he accepts appointment to conduct litigation away from home.

If, as has been so often said, a rule of law is no sounder than the reasoning on which it is based, then it is respectfully contended that the soundness of the Mecom case is highly questionable.

CASES HOLDING TO THE CONTRARY

Below are cases in which an administrator has been held to be a *mere nominal party* for determining rights arising under various phases of the litigation.

Stewart Adm'r v. Baltimore & O. Ry. Co., 168 U. S. 445, 18 S. Ct. 105, 42 L. Ed. 537 was a case where the deceased was killed in Maryland. The Maryland death statute provided that the action must be brought by and in the name of the State of Maryland for the benefit of the designated relatives. The suit was brought in the District of Columbia by an administrator appointed under the District death statute, which also designated the beneficiaries and provided that the action must be brought by the administrator. The Court held that the action was entertainable in the District Court because the administrator was merely *a nominal party*, as was the State of Maryland under the Maryland statute. Some pertinent statements are as follows:

> * * * The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. *Each is simply a nominal plaintiff*. While in the District *the nominal plaintiff is*

the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative. (Emp. ad.)

For purposes of jurisdiction in the Federal courts regard is had *to the real rather than to the nominal party*. Browne v. Strode, 9 U. S. 5 Cranch, 303 (3:108); M'Nutt v. Bland, 43 U. S. 2 How. 9 (11: 159); State of Maryland, for Use of Markley v. Baldwin, 112 U. S. 490, (28: 822) See also Gaither v. Farmers' & Mechanics' Bank of Georgetown, 26 U. S. 1 Pet. 37, 42 (7: 43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: "This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use is regarded as the real party to the suit.*" It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the *real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought;* and the courts of either jurisdiction will see that the damages awarded pass to such party. (Emp. ad.)

Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and *the manner*

of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages *which each beneficiary* has sustained by reason of the death. (Emp. ad.)

Bussey v. Charleston & W. C. Ry. Co., 73 S. C. 215, 53 S. E. 165. This is a death case. The death sued on occurred in Georgia. Under the Georgia death statute the widow may sue in her own name. She sued in her own name in this action in the South Carolina courts. Held that the Georgia statute prescribing the parties authorized to bring the action pertained to the remedy rather than to the right. Hence the South Carolina statute which requires a death action to be prosecuted by or in the name of the personal representative applies, as a means of affording the remedy to enforce the basic right, and the action must be by or in the name of an administrator, as prescribed by the South Carolina Statute. The Court said:

> The underlying question is whether the provision in the Georgia statute, relative to parties authorized to bring the action, pertains to the *right* or to the *remedy*. If it was intended to affect the right of recovery, then the action should conform to such requirement; while, on the other hand, if it should be regarded as remedial, the courts of this state will apply the mode of procedure prevailing in this state. Our construction of the Georgia statute is that *its intention was to designate the beneficiaries,* and not to prescribe the mode of procedure. If the statute of Georgia had provided as a consideration precedent to a recovery of damages that the action should be brought in the name of the widow, such provision would have formed part of the right instead of the remedy, and, when an action was brought in another state, it would have to be instituted in her name. If the

plaintiff is required to conform her pleadings to the law of this state, it will not affect her substantial rights. (Emp. ad.)

Comment: This is in accord with the idea expressed in the last paragraph of the above quotation from Stewart's case. It holds that the basic right is in the beneficiary and the designation of the person to sue is merely procedural.

In *Chicago R. I. & P. R. Co. v. Schendel,* 270 U. S. 611, 46 S. Ct. 420, 70 L. Ed. 757, the court held that in a suit by an administrator in Minnesota for recovery of damages for the sole benefit of the widow, under the Federal Employers' Liability Act, which required the suit to be by the administrator, that an action brought by the widow in Iowa, under the Iowa Workman's Compensation Act, which authorized her to sue individually, operated as a bar by *res judicata* to the action of the administrator in Minnesota. The Court said:

> Since the statutory authority of the administrator is to sue, not in his own right for his own benefit or that of the estate, but in the right and for the sole benefit of the widow, the same principles are applicable in accordance with the general rule that "whenever an action may properly be maintained or defended by a trustee in his representative capacity, without joining the beneficiary the latter is necessarily bound by the judgment." 1 Freeman Judgments 5th Ed. Sec. 500. *Identity of parties is not a mere matter of form, but of substance.* Parties *nominally the same may be in legal effect, different* (Bigelow, Estoppel, 6th Ed. 145); and parties nominally different may be in legal effect the same * * * (auth. omitted). (Emp. ad.)

This idea was followed in *Vaughn's Adm'r v. Louisville & N. R. Co.*, 297 Ky. 309, 179 S. W. (2) 441, 152 A.L.R. 1060, where the Schendel case, supra, was cited and quoted as the basis for saying *"The administrator is merely a nominal plaintiff. The real parties in interest are the beneficiaries whom he represents."* (Emp. ad.)

Deupree v. Levinson, 186 F. 2nd. 297 (6th Cir.) says:

> As to diversity cases, "a federal court adjudicating a *state created right* solely because of diversity of citizenship of the parties is for that purpose, in effect, only another court of the State * * * Guaranty Trust Company of New York v. York, supra, 326 U. S. at page 108, 65 S. Ct. at page 1469 (page 301).
>
> A statutory provision requiring action to be brought by an executor or administrator *is not an essential part of the right created* nor a jurisdictional prerequisite to the court's power to entertain the action the important part of the law is that *which gives the right of action,* and not that part which provides *who may enforce it;* the latter is an incidental provision. * * * Here the person authorized to enforce the action was the person representing the deceased * * and *under Kentucky law he is merely a nominal party.* Vaughn's Adm'r v. Louisville & N. R. Co., 297 Ky. 309, 179 S. W. 2nd. 441, 152 A.L.R. 1060. Cf. Stewart v. Baltimore & Ohio R. Co. 168 U. S. 445, 449, 18 S. Ct. 105, 42 L. Ed. 537. * * * *How the appellant should proceed and in whose name the action is brought is a matter of form only.* (Page 302) (Emp. ad.)

In *Cooper v. American Air Lines*, 149 F. (2) 355, an executrix appointed in Pennsylvania was permitted as a non-resident to sue in the Federal court in New York for recovery of damages for a wrongful death occurring in

Kentucky, and controlled by the Kentucky death act, which provided that "the action shall be prosecuted by the personal representative of the deceased," and that the amount recovered shall be for the benefit of specified beneficiaries. The court cites the above Vaughn case, on the point that the real parties in interest are the beneficiaries, and further says:

> If those beneficiaries had been permitted to and had brought suit in their own names, unquestionably their action would not have been ousted. To reach a different conclusion because the *nominal plaintiff* is a "representative" appointed by a court of another state would be to rest judgment, irrationally on the sheerest verbalism. (Emp. ad.)

Fenton, Adm'r. v. Sinclair Oil Refining Company (Okla. Cas.) No. 36,289, filed 2-23-55__Okla.__, __P. 2d.__, 4 C.C.H. Neg. Cases 2d. 605. (The first two citations cannot be furnished because it has not yet been published either in the Oklahoma reports or by the West Reporter System. However, we are lodging with the Clerk of this Court a C.C.H. Neg. Cas. Advance Sheet publication for the information of this court.) This case is of particular interest because it interprets the Oklahoma statutes involved in the Mecom case as to who is the real party in interest.

In this Fenton case Noble T. Rush, a resident of Oklahoma, was killed in Kentucky by an airplane owned and operated by the defendant, Sinclair Oil Refining Company. He left surviving a widow and minor children residents of Oklahoma, as sole beneficiaries under both the Kentucky and Oklahoma death statutes. The defendant is a resident of Maine, and the plaintiff administrator is also a resident of Maine, selected and appointed, no doubt, to avoid a removal under the authority of *Mecom v. Fitzsimmons Drilling Company*. Suit was instituted by the administrator

in the state court of Oklahoma to recover damages for the alleged wrongful death which occurred in Kentucky. The cause of action arose under the death statute of Kentucky. The statute of limitations for instituting a death action in Kentucky is *one* year and in Oklahoma it is *two* years. The suit was instituted in Oklahoma more than one year, but within two years, after the death of Rush. The lower court dismissed the action on the ground that the Kentucky statute of limitations applied, in that the cause of action had arisen between non-residents of Oklahoma in the State of Kentucky where the statute of limitations was one year. (See Tit. 12, O. S. 1951, Sec. 99, quoted in the opinion).

The lower court's opinion was based upon the idea that the administrator was the real party in interest, resulting in a cause of action arising in another state between non-residents of Oklahoma thereby making the Kentucky statute applicable. This was in accord with the theory of Mecom's case which held the administrator to be the real party in interest.

The Oklahoma Supreme Court reversed the order of dismissal on the ground that the widow and children were the sole beneficiaries of the recovery under the Kentucky death statute, and, hence, were the real parties in interest,—the administrator being merely a nominal party,— and their residence controlled on the question of which statute of limitations applied. Mecom's case was cited, and the court held it did not control.

The Fenton case says:

* * * under the Kentucky statute, the Administrator, is merely the ***nominal plaintiff,*** the real parties in interest being the beneficiaries he represents (Vaughn v. L. & N. R. Co., 297 Ky. 309, 179 S. W. 2d. 441, 152 A.L.R. 1080; Square Deal Cartage Co. v. Smith, Adm'r, 307 Ky. 125, 210 S. W. 2d. 340; Deupree v. Levinson, 186

F. 2d. 297), we think that the beneficiaries of the death claim and the person, firm, association, corporation, or group thereof, against whom the claim lies *are the ones "between" whom "the cause of action has arisen"* within the meaning of Tit. 12 O. S. 1951, sec. 99, supra. We, of course, can make no determination as to whom such a cause of action accrues that can be binding in Kentucky, but we think *our interpretation of this Statute of our own State is the only logical one, and the only one that could be said to have been within the contemplation of our Legislature when this law was enacted.* And it comports with the interpretation given our own death statute. See City of Shawnee v. Cheek, 41 Okla. 227, 137 P. 724. When it passed the law, it must be presumed to have been thinking of the substance of the matter (see Midland Valley R. Co. v. Townes, Adm'r, 179 Okla. 136, 64 P. 2d. 712)—*the real parties in interest—those who would suffer the detriment and be entitled to be compensated* therefor, rather than he who might be required to represent them or bring the action for them in order to comply with some other statute enacted in this or some other jurisdiction which might be subject to various and sundry interpretations by this or some other court. (Emp. ad.)

* * * There is a well recognized distinction between the party to whom a chose in action belongs and he who has legal capacity to sue upon it or to settle the suit after instituting it, (in this connection see the discussions in National Valve & Mfg. Co. v. Wright, supra; Carden v. L. & N. R. Co., 101 Ky. 113, 39 S. W. 1027, 1028, and Deupree v. Levinson, supra) just as there is quite a difference between a chose in action or cause of action, and an action or suit, which is merely the means of enforcing, or recovering damages for, it. It cannot be too greatly emphasized that the term used in the statute is

"cause of action." An incidental, but not unimportant consideration of resting the matter upon who are the parties to the "cause of action" rather than the "action" (as our Legislature has chosen to do) is stability and certainty in determining the forum in which such action shall be tried and the period of limitations applicable to it. * * * Nor is the rule followed by the federal courts in determining diversity of citizenship for the purpose of ascertaining the jurisdiction of such courts (Mecom v. Fitzsimmons Drilling Co., supra) determinative of the matter.

It follows from the conclusions herein reached, that since Mrs. Rush and her children are residents of Oklahoma, the cause of action involved was not that "has arisen * * between non-residents * *" as contemplated in Tit. O. S. 1951, sec. 99, supra, and the Kentucky one-year period of limitations is not applicable to this Oklahoma action. The action was filed within the applicable Oklahoma 2-year period of limitations.

Square Deal Cartage Co. v. Smith's Adm'r., 307 Ky. 135, 210 S. W. 2nd. 340, says:

> * * * the personal administrator is merely a nominal plaintiff in an action for death, and *the real parties in interest are the beneficiaries* whom he represents (Vaughn's Adm'r v. L. & N. Railroad Co., 297 Ky. 309, 179 S. W. 2d. 441, 152 A.L.R. 1060). (Emp. ad.)

Louisville & Nashville R. Co. v. Jones' Adm'r., 215 Ky. 774, 286 S. W. 1071 (1075), was a case where an administrator was appointed in Tennessee for a decedent domiciled in Kentucky and by action in Tennessee courts sued for damages for wrongful death resulting in a compromise verdict. Later an administrator who had been previously appointed in Kentucky instituted an action in

Kentucky. The adjudication in the Tennessee action was pleaded in defense and the plaintiff countered with a charge of fraud in the Tennessee action. The court said:

> As shown above, he (the Kentucky administrator), at best, *is only a nominal plaintiff. He is not the real party in interest.* And if the dominus litis in the Tennessee proceeding or the beneficiaries thereof do not complain of the judgment rendered in that case then the Kentucky administrator may not interpose such a plea. (Emp. ad.)

Harrison v. Carter, 226 N. C. 36, 36 S. E. 2nd. 700, 164 A.L.R. 697, holds in a death action that the personal representative though a necessary, is nevertheless a formal or nominal party, acting in the capacity of trustee or agent of beneficiary of the estate.

Gibson v. Solomon, 136 Ohio St. 101, 23 N. E. 2nd. 996, holds in a death case that the personal representative is but a nominal party and the designated beneficiaries for whose exclusive benefit the action is maintainable are the real parties in interest.

Riley v. Lukens Dredging and Contracting Corp., 4 F. S. 144 holds that the administrator is merely a formal party for maintenance of action for wrongful death under New Jersey statute.

Wallan v. Rankin, 173 F. 2d. 488, holds that under the Oregon Statute a personal representative is a statutory trustee to sue for damages for wrongful death and that the real parties in interest are the statutory beneficiaries.

Howard v. Pulver, 329 Mich. 415, 45 N. W. 2nd. 530, holds that under Indiana wrongful death statute the beneficiaries are the real parties in interest.

Kyes v. Penn. Ry. Co., 158 Oh. St. 362, 109 N. E. 2nd. 503, holds that the personal representative is not the real

party in interest, but acts merely as a nominal or formal party or statutory trustee for the statutory beneficiaries who are the real parties in interest.

Dralle v. Steele, 13 Alaska 680, holds that under the wrongful death statute of Alaska suit must be in the name of personal representative but he is merely a nominal party who sues for benefit of the statutory beneficiaries who are the real parties in interest.

Bryon v. Inspiration Consol. Copper Co., 20 Ariz. 485, 181 P. 577. Action by administrator to recover for wrongful death under Employer's Liability Act. The Arizona Statute conferred no right on the administrator to sue, however, he claimed the right to sue under a general statute which requires all actions to be in the name of the real parties in interest, "provided, an executor, administrator * * may sue without joining with him the person for whose benefit the action was brought", etc. Held that the parents of the deceased were the real parties in interest and suit had to be prosecuted by them in their name.

Tom Reed Gold Mines v. George, 21 Ariz. 303, 188 P. 130, holds the same.

Davis v. New York Cent. & H. R. R. Co., 233 N. Y. 242, 135 N. E. 277, says the executrix, though a necessary, is a formal party.

Crouse v. New York State Rys., 209 N. Y. S. 264, holds same.

The death statutes of the several states, while varying somewhat in verbiage, are all based upon the so-called Lord Campbell's Act, and all create a right of recovery which did not exist at common law for the exclusive benefit of certain specified beneficiaries. These statutes also differ in some instances as to who shall be the nominal plaintiff in an action to recover on the cause of action thus created,

but all create the same basic right to a damage for the benefit of specified relatives in compensation to them for the loss of benefits which would have accrued to them had the decedent not been wrongfully killed. Why, then, should there be any division of opinion between this court and the various appellate courts of the land as to whether the persons for whose benefit such causes of action were created, or the nominal statutory trustees, are the real parties in interest? Logic and the reality of purpose and result are the criterions by which this question should be answered. Undoubtedly Mecom's case is wrong on this point.

CONFLICT WITH CONSTITUTIONAL PROVISIONS

The decision in the Mecom case is in conflict with applicable provisions of the Constitution of the United States and the Acts of Congress concerning the jurisdiction of Federal courts.

It seems clear that the recited effect of the Oklahoma Statute "which made the administrator the statutory trustee of an express trust and require the suit to be brought and controlled by him" is the pivotal point on which the decision in the Mecom case is made to rest. It has been generally held that the proceeds of the recovery under death statutes of various states belong to the statutory beneficiaries and are not in any sense assets of the estate, and that in the instances where the suit is required to be in the name of the administrator, or some person other than the beneficiary, he is merely a statutory trustee to sue for the recovery. ***Bennett v. Spartanburg, etc.,*** Supra, (97 S. C. 27, 81 S. E. 189). Also in the case of In Re Mayo's Estate, Supra, (60 S. C. 401, 38 S. E. 634), where the court further said that the legislature "could as well have imposed the duty (of suing) on the sheriff or the coroner."

If the sheriff or coroner had been so designated they, necessarily being residents of South Carolina in order to hold such office there would be a diversity to work the removal, —if the residence of the statutory trustee is to control. Or, the legislature could as well have vested the right to sue in the beneficiaries themselves wh[illegible] if residents, as in our case, and as in the Mecom case, would have supplied the diversity to work the removal. Indeed, in Mecom's case the Oklahoma statute gave the widow the right to sue in the absence of the appointment of an administrator. Each of the two suits brought by her were removed because her residence in Oklahoma created the necessary diversity. It was only after the two actions brought by her had been so removed that she abandoned her right to sue and *resorted to the provisions of the state statute providing for suit by the administrator,* and had a resident of Louisiana, the state of the residence of the defendant, appointed in order to defeat the non-resident defendant of its constitutional right to defend in a court of Federal jurisdiction. Therefore, whether it was so intended or not, it was the effect given to the provisions of the death statute of Oklahoma requiring the suit to be prosecuted by the administrator, if one be appointed which, the court said made him the *real party in interest* and by use of another rule of state law a person of the same residence as that of the defendant, was appointed as administrator and thereby defeated the removal.

Had the question been raised and considered in that case contesting the effectiveness of that portion of the Oklahoma statute thus employed to defeat the jurisdiction of the Federal court which was delegated to it by the Constitution, the result in that case would necessarily have been different.

So, petitioner, in urging the necessity of a review of the decision in Mecom's case on the ground that it is unsound

points to the fact that the very ground upon which it rests, has resulted in the court inadvertantly, but erroneously, giving effect to a state statute to "abridge, destroy, limit and render inefficacious" the jurisdiction of the Federal courts over controversies between citizens of different states, in contravention of Section 2, of Article III; Section 1 of the Fourteenth Amendment; Section 2 of Article IV; and the Fifth Amendment, of the Constitution of the United States.

The validity of the ruling of Judge Williams in the order appealed from to the effect that this case is not removable and the denial of the right on that ground to take the depositions is challenged as being violative of the aforesaid provisions of the Constitution.

As authority for these positions, petitioner cites the cases following:

Harrison v. St. Louis & S.F.R. Co., 232 U. S. 318, 34 S. Ct. 333, 58 L. Ed. 621. This was an action to restrain interference with the Railroad Company's business in Oklahoma under an order issued by the Secretary of State cancelling the license of the Railroad Company to do business in Oklahoma pursuant to a statute of said state which provided for such cancellation in case the Railroad Company filed a petition for removal to a Federal court on grounds of diversity of citizenship any action instituted against it in the courts of the State of Oklahoma. In holding that the cancellation of the license of the Railroad Company on such ground was void for repugnancy to the provisions of the Federal Constitution which granted to Federal Courts jurisdiction of actions involving controversies between citizens of different states, The Court said:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided

for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states *may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.* The doctrine is so elementary as to require no citation of authority to sustain it." (Emp. ad.)

Terral v. Burke Const. Co., 257 U. S. 529, 42 S. Ct. 188, 66 L. Ed. 352, was another case involving the question of the constitutionality of a statute of the State of Arkansas which made the right of a foreign corporation to retain a license to do business in the state contingent on its refraining from removing to a Federal court any action brought against it by a citizen of Arkansas in the courts of the state. Chief Justice Taft applied the principle of the Harrison Case, and specifically overruled the cases contra, viz: Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; and Security Mutual Life Ins. Co. v. Prewit 202 U. S. 246, 50 L. Ed. 1013, saying that "The views of the minority judges in those cases have become the law." Speaking of the principle he further said:

"It rests on the ground that the Federal Constitution confers on citizens of one state the right to resort to Federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtain the full exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

This principle has been followed and applied in Stoll v. Hawkeye Casualty Co., 185 F. 2d. 96; Stewart v. Ferer, 163 F. 2d. 183; and Foy & Shemwell v. Georgia-Alabama P. Co., 298 F. 643.

Under the principle of these decisions no effect whatever can be properly given to the provisions of a state statute when such provision, directly or indirectly, results in affecting the jurisdiction conferred by the Constitution on the courts of the Federal judiciary. This is necessarily true, because otherwise the jurisdiction of Federal courts over actions against a non-resident for wrongful death, created by state statutes, would be left to *oscillate* back and forth, depending upon the variances in said statutes as to the designation of statutory trustees to enforce the claim. In such a situation the rights of persons sued in a state other than that of their residence to defend in a court of Federal jurisdiction cannot possibly be administered with the equality, uniformity, and dependability which is contemplated in respect to securing the benefits of constitutional guarantees to the people.

Whereas, if, by rule of decision, based on fixed fundamental principles, and applicable in all cases, rather than on varying statutory provisions, the persons who are designated by statute to be the *owners* of the recovery in death actions are held to be the *real parties in interest,* as reason dictates, and as the great weight of authority has held to be the case in matters other than questions of removability, then there will be a complete avoidance of collision with provisions of the Federal Constitution which prohibits a state from making or enforcing any law which abridges the privileges and immunities of citizens of different states, or which renders inefficacious the prescribed jurisdiction of the Federal judiciary; and also an avoidance of collision with provisions which prohibit the taking of property, etc., without due process of law. Moreover, it will simplify the determination of the basic question of removability in death actions, on grounds of diversity, by reducing it to the relatively simple process of finding the answer to the questions, of (1) who are the statutory beneficiaries? and (2) what

is the state of their residence? Thus it would afford a sharply defined rule and an easily applied method for the guidance of District Judges in determining the important question of Federal jurisdiction on questions of removal and would greatly minimize the opportunity for error in cases of granting orders of remand, which error cannot be corrected by appeal.

For the reasons above stated the petitioner prays that the court grant the petition of certiorari herein appealed for.

Respectfully submitted,
CHARLES F. ROUSE, Raleigh, N. C.
A. Y. ARLEDGE, Raleigh, N. C.
Attorneys for Petitioner

OPINION OF COURT OF APPEALS APPENDED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6984

CAROLINA POWER AND LIGHT COMPANY
A CORPORATION

Appellant,

versus

R. R. JERNIGAN, ADMINISTRATOR OF THE ESTATE OF HAYMIE WARREN, DECEASED

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT FLORENCE.

(Argued May 26, 1955 Decided May 27, 1955)

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

A. Y. Arledge (T. D. Paulling on brief) for Appellant, and John L. Nettles and James P. Mozingo, III, (Archie L. Chandler on brief) for Appellee.

Per Curiam:

This is an appeal from an order suppressing the taking of depositions until the court should have ruled upon a motion to remand. Appellant, the Carolina Power & Light Company, a North Carolina corporation, was sued in the Court of Common Pleas of Darlington County, South Carolina, to recover damages on account of wrongful death by one Jernigan, administrator of the estate of Haymie Warren. Although the administrator was a citizen and resident of North Carolina, the state of incorporation of the defendant, the defendant filed a petition for removal into the court below on the ground that the real parties in interest were the parents of Haymie Warren, who were entitled to any amount that might be recovered as damages in the action, that they were citizens and residents of the state of South Carolina and that they and their attorneys had procured the appointment of a citizen of North Carolina as administrator in an attempt to prevent the removal of the case into the federal court. A motion to remand was made by the defendant, which was set for hearing before a judge assigned to hold the courts of the District; and, while the motion was pending, defendant gave notice of the taking of the depositions of certain witnesses by whom defendant proposed to prove that a citizen of North Carolina was appointed administrator for the purpose of preventing removal to the federal courts as well as certain facts with regard to decedent's death. The resident judge, being of opinion that the case would have to be remanded under the decision of the Supreme Court in *Mecom v. Fitzsimmons Drilling Co.* 284 U. S. 183, even though the allegations with respect to the reasons for appointment of Jernigan as administrator were established, entered an order that the taking of depositions be "suppressed until such time as the court shall have ruled on the plaintiff's motion to remand". From this order the defendant has ap-

pealed. We think it perfectly clear that the order is not a final order from which an appeal lies to this court and that the appeal must be dismissed for this reason. *Baltimore Contractors, Inc. v. Bodinger* 348 U. S. 176; *Morgantown v. Royal Ins. Co., Ltd.* 337 U. S. 254; *Cobbledick v. United States,* 309 U. S. 323; *Arnold v. W. B. Guimarin & Co.* 263 U. S. 427; *Ella Fischer Beury et al v. William Beury et al,* 4 Cir. __ F. 2d. __; *E. I. duPont de Nemours Company, Inc. v. Hall* 4 Cir. 220 F. 2d. 514; *National Bondholders Corp. v. McClintic* 4 Cir. 99 F. 2d. 595.

Appeal Dismissed.

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Supreme Court of the United States

OCTOBER TERM, 1955

NO. 221

CAROLINA POWER AND LIGHT COMPANY,
a Corporation,
Petitioner

VERSUS

R. R. JERNIGAN, Administrator of the Estate
of Haymie Warren, Deceased,
Respondent

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT

OPINION BELOW

The Order of the District Court is unreported, as is the Opinion of the Court of Appeals; however, the Opinion of the Court of Appeals as printed by Petitioner in its Appendix at page 56 contains an error The word "defendant" on line 19, page 57, should read "plaintiff."

STATEMENT OF CASE

This action was begun on November 6, 1954 by Respondent R. R. Jernigan, Administrator of the Estate

of Haymie Warren, deceased, a citizen of the State of North Carolina, in the Court of Common Pleas for Darlington County, South Carolina, to recover damages for the wrongful killing of his intestate by the Petitioner, Carolina Power and Light Company, a corporation chartered under the laws of the State of North Carolina, as a result of its negligence in constructing and maintaining a dangerously high voltage power line over a pre-existing well in the yard of the residence of the late C. C. Weatherford, near Dovesville, State of South Carolina.

In due time on November 23, 1954 the Petitioner removed the cause to the United States District Court for the Eastern District of South Carolina, Florence Division.

On February 17, 1955, the Petitioner served notice of taking the deposition of Respondent on February 23, 1955, and a notice of taking the deposition of Elijah Warren, Maggie Bell Warren, Cora J. (Mrs. C. C.) Weatherford and Boyd Amerson.

On February 17, 1955, after receiving copies of the above notices of depositions, Respondent served Petitioner with a notice and motion for protection under Rule 30 (b) of the Federal Rules of Civil Procedure. The motion was noted to be heard five days after service or on February 23, 1955, or at such time as might be thereafter set by the Court, in accordance with local custom.

At the same time Petitioner was given a notice and motion for remand, previous informal notice having been given to Petitioner's counsel in open court.

On February 18, 1955, Petitioner withdrew its notice of taking the deposition of Respondent on

February 23, 1955, and served an additional notice that the same would be taken on February 25, 1955.

Immediately thereafter Respondent again served a notice and motion for protection under Rule 30 (b).

On February 21, 1955, upon affidavit, the Court issued a Rule to Show Cause returnable on March 7, 1955, or at such time as the Court might thereafter set, temporarily enjoining and restraining the Petitioner from taking said depositions until such time as the Rule could be heard by the Court.

On February 23, 1955, Petitioner noticed a motion to dissolve the Rule to Show Cause, to which was attached an affidavit of A. Y. Arledge to the effect that the purpose of taking the deposition was to obtain evidence for use in the trial of the case on its merits, evidence which Petitioner would not be entitled to under state law. (Petitioner's Appendix, p. 39.) The motion was set to be heard by the Court in Greenville, South Carolina, on February 26, 1955, and a hearing was then held, at which time all pending motions before the Court were heard except the Motion to Remand.

On March 11, 1955, the Court handed down its order granting Respondent motions made under Rule 30 (b).

On March 15, 1955, Petitioner filed its Notice of Intention to Appeal from the interlocutory order of March 11, 1955.

On March 19, 1955 Respondents Motion to Remand came on for a hearing before the Honorable Walter E. Hoffman, then Presiding Judge of the United States District Court for the Eastern District of South Carolina, Florence Division, Special March

Term 1955. Upon being advised by counsel for both Petitioner and Respondent of the then status of the case, his Honor concluded that Petitioner's Notice of Intention to Appeal, though improperly taken from an interlocutory order, had the effect of depriving the District Court of the power to decide the motion, but that the Court would hear the motion and hand down its decision immediately after the Circuit Court of Appeals determined whether or not the order appealed from was in fact appealable at the time and whether or not the District Court abused its discretion in staying the taking of depositions pending the hearing on Respondent's motion to Remand.

On March 24, 1955, the Petitioner filed a notice and motion under Rule 60 (a) to correct errors in the order of March 11, 1955, and on the same day the Court issued its order denying Petitioners motion to correct.

On May 26, 1955, arguments were heard by the Court of Appeals for the Fourth Circuit, both parties being allowed to argue on the merits. The Court rejected the contentions of petitioner.

On May 27, 1955, the Court of Appeals in a Per Curiam Opinion held that the order appealed from was not a final order and, therefore, not appealable. The Court dismissed the appeal on that ground without comment on the merits of Petitioner's contention.

On June 15, 1955, Respondent petitioned the Court of Appeals to issue its mandate to the District Court so that his motion to remand could be heard in sufficient time to bring the case on for a trial on the merits at a special July term of the Court of Common Pleas for Darlington County, South Carolina, if granted.

On June 15, 1955, Petitioner petitioned the Court

of Appeals to stay the mandate until August—, 1955, to allow A. Y. Arledge a vacation.

On June 22, 1955, the Court of Appeals in an order by Chief Judge John J. Parker, stayed the mandate pending the application by petitioner for a Writ of Certiorari, provided the same was filed in this Court by July 10, 1955.

STATEMENT OF FACTS

Respondent deems it necessary to amplify and clarify the Petitioner's statement of the case and facts material to the questions presented in the following particulars.

The respondent attempted to use the discovery provisions of the Federal Rules of Civil Procedure to obtain evidence for use by respondent at the trial of the case on its merits in the state court (App. 39) and not to discover the legal relationship between respondent, the heirs of the deceased and their counsel.

Depositions were noted for respondent, R. R. Jernigan, Elijah Warren and Maggie Bell Warren, father and mother of the deceased, and in addition, Cora (Mrs. C. C.) Weatherford and Boyd Amerson. The latter two are no relation to the deceased, his parents or to their counsel and, therefore, have no knowledge which would aid respondent in proving the allegations of its removal petition.

The dockets in the Federal Courts are extremely crowded, so much so that recently two District Judges from other states have been assigned to hold Court in the Eastern District of South Carolina. Judge Hoffman, before whom the motion to remand was set,

was one of these, and the reason the motion for remand was noted before him was in order to expedite the hearing and for the convenience of the Court. In addition, it is the practice in the Eastern District to note motions which are heard by the Court as they can be reached. All respondent could do was to file his motion for protection under Rule 30 (b) and await an opportunity to be heard. Respondent could not force the Court to hear it; however, respondent did obtain the rule to show cause so as to not be prejudiced pending a hearing on his motion. Furthermore, respondent originally petitioned for stay, but the Court would not grant it without a hearing.

The Rule to Show Cause did not surplant the motion under Rule 30(b), but was supplemental thereto. Petitioner could not have taken the depositions until the Court ruled on respondent's motion under Rule 30 (b).

The order of March 11, 1955, was issued on respondent's motion under Rule 30 (b) The Rule to Show Cause, if an injunction, expired as provided in Rule 65, as it was obtained without notice.

REASONS FOR NOT GRANTING WRIT

I

Generally

The attempt by petitioner to have the sufficiency of its petition for removal tested by the Circuit Court of Appeals and by this Court is an attempt to circumvent the positive prohibition contained in Section 1447 (d) of Title 28, U. S. C., which prohibits a review of an order remanding a case to the State Court by appeal or otherwise, and is taken for delay only.

Both the District Judges involved offered to treat the allegations of Petitioner's petition for removal as true in passing upon Respondent's motion to remand, yet Petitioner in both instances refused to have it so treated. The most petitioner could have proved by taking the depositions is that the parents of the deceased and their counsel attempted to use the name of respondent to defeat federal jurisdiction. The only purpose, therefore, petitioner could have in taking its appeal and in petitioning this Court for a Writ of Certiorari is to delay the trial on its merits. There have been several terms of court in Darlington County and in the Florence Division of Federal Court since petitioner refused the offer of the District Judges.

The petitioner has been deprived of no constitutional right to be sued in a Federal Court. The Constitution does not provide that all suits between citizens of different states must be tried in a Federal Court. If that were the case, Congress could not have required a jurisdictional amount as a prerequisite for jurisdiction in the District Courts. If the instant suit were not for a sum in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and cost, petitioner would have no rights in Federal Court.

The allowance of the Writ in this case will, in effect, repeal Section 1291 of Title 28, USC, and will result in long delays which said section was enacted to prevent.

If it is true that Judge Hoffman will be bound by the reasoning of Judge Williams in granting Respondent's motion under Rule 30(b) and that his reasoning therein amounts to a holding that the case is not removable, in effect an order of remand, then clearly

section 1447 (d) of Title 28, U. S. C., prohibits any review by this Court or any other court.

The District Judges offered to treat the allegations of respondents' petition for removal as true, and while respondent respectfully submits that such allegations are unfounded, unwarranted, scandalous and untrue, petitioner ought not to be allowed to do a useless thing, i. e., take the depositions to prove such allegations. Such refusal on the part of the petitioner, it would seem, would be sufficient grounds to stay the depositions, which after all is discretionary with the District Court.

II

The District Court, in the exercise of its discretion, had the authority to issue its Rule to Show Cause, dated February 19, 1955, and its interlocutory order, dated March 11, 1955 staying the taking of depositions pending the hearing on its merits of Respondent's motion to remand.

The action of the District Court in staying the taking of the depositions by Petitioner is clearly authorized under Rule 30 (b) of the Federal Rules of Civil Procedure, which reads as follows:

> **Rule 30. Depositions Upon Oral Examination.**
>
> (b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, *the court in which the action is pending may make an order that the deposition shall not be taken*, or that it may be taken only at some designated place other than that stated in the

notice, or that it may be taken only on written interrogratories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the Court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court; *or the Court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.*" (Emphasis added).

This authority granted the District Court in Rule 30 (b) was exercised in *National Bondholders Corporation v. McClintic*, 99 F. 2d. 595, 4 Cir., wherein the Court, in the following clear, concise and unambiguous language, stated:

"Notice for the taking of the depositions had been given by the plaintiffs under Rule 26 of the new Federal Rules of Civil Procedure which became effective September 16, 1938, but under rule 30(b) the District Judge had discretion to order that they should not be taken. This rule 30(b) provides as follows:

" 'After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and *for good cause shown*, the Court in which the action is pending may make an order that the depositions shall not be taken' " et seq. (Italics supplied.)"

"It is clear that the District Judge was vested with a judicial discretion in passing the interlocutory order now complained of. For this rea-

son mandamus does not properly lie to reverse the action taken."

In Moore's Federal Practice, Second Edition, at page 2026 of Volume 4, it is stated that where a deposition is taken for an improper purpose, as for use in a state court action, its taking may be barred. Petitioners purpose in taking the deposition in the instant case was clearly for use in the State Court action, as is indicated by paragraph 4 of its notice and motion to dissolve the temporary restraining order wherein Petitioner admits that it intends to "extend the scope of its examination to discovering pertinent facts out of which this action arose including the whereabouts or disposition of the well pipe which it is alleged was involved in conducting the electricity which killed Haymie Warren." (App. p. 39).

The rule in question, to wit: Rule 30 (b), and the case of *National Bondholders Corporation v. McClintic*, decided thereunder, are so clear that we do not deem it necessary to pursue this aspect of the matter further.

III

The Interlocutory Order of March 11, 1955 Staying the Taking of the Depositions Is Not Appealable, as a Final Order, and therefore it was Not Error for the Court of Appeals to Dismiss Petitioner's Appeal.

It is well established that the Federal Courts will entertain appeals only in those matters in which final orders or judgments have been rendered. This rule of law has been repeatedly enunciated through the years both by the United States Supreme Court and the Circuit Courts of Appeal.

There is little doubt that the order appealed from in the instant case is not a final order or judgment within the meaning of the decisions which must govern the disposition of this matter. Nor can it be seriously contented that Petitioners alleged right to have the depositions of the various witnesses taken is a right separable from and collateral to the main relief sought in the action. If such a right exists in favor of the Petitioner it is one which may be acted upon by the Appellate tribunal at the time an appeal is taken from any final judgement rendered on the merits, that is if a federal question is involved as contended by Petitioner.

Mr. Justice Frankfurter, in *Lloyd N. Cobbledick v. United States of America*, 309 U. S. 323, 84 L ed. 783, announces the rationale of the rule that an appeal shall lie only from final orders or judgements in the following language applicable to the facts in the instant case:

> "The question is whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review by Sec. 128(a) of the Judicial Code (28 USCA, Sec. 225).
>
> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against

> enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.
>
> * * *
>
> "In thus denying to the appellate courts the power to review rulings at nisi pruis, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finally—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in Sec. 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system."

In principle there is no distinction between the order complained of in the *Cobbledick* decision, *supra*, and the order of the District Court in the instant case staying the taking of the depositions by the Petitioner.

We submit that the question here involved is disposed of in the well considered opinion of the Fourth Circuit Court of Appeals in *National Bondholders Corporation v. McClintic*, *supra*, in which the Court denied a petition for a writ of mandamus to vacate an order of the District Court staying the taking of depositions. Speaking for the Court, District Judge Chestnut stated the applicable rule in the following succinct language:

> "The determination of the existence of the sufficiency of the cause against taking the depositions in this case was for the district judge in his

> judicial discretion. On this application for mandamus to reverse his ruling on an interlocutory matter, we cannot properly substitute our judgment for his as to the determination of what constituted good cause for the order even though if and when the case should ultimately be here on appeal, the court may be of a different opinion."

Moreover, in numerous other instances the appealability of orders of the character of that involved in the instant case has been determined.

In the case of *Belships Co. Ltd., Skibs A/S v. Republic of France*, 184 F. 2d. 119, 2d Cir., the Court of Appeals refused to issue a writ of prohibition or mandamus to prevent the taking of depositions of witnesses who allegedly were improperly subpoenaed.

Likewise, in *Fred Benioff Co v. McCullough* 133 F. 2d. 900, 9th Cir., the Court of Appeals refused to review an order of the District Court which conditioned the taking of a deposition on payment of the costs and based its opinion upon the lack of finality of such an interlocutory order, as appears from the following language:

> "The question of the legality of the imposition of such costs is one which may be entertained by us on appeal if petitioner win on the merits, *Newton v. Consolidated Gas Co.*, 265 U. S. 78, 83. If it lose on the merits, its appeal on the entire case brings before us error claimed in such interlocutory orders not immediately appealable."

To the same effect is the *per curiam* opinion of the Court of Appeals for the Tenth Circuit in *Dille v. Carter Oil Co., et al.* 174 F. 2d. 318, wherein it is stated:

> "It is well settled that an order requiring a person to give his deposition, and in connection therewith to produce pertinent documents *is not*

a final order or judgment from which an appeal may be taken." (Emphasis added.)

The rule as laid down in the decisions cited above is of long standing, as is shown by the decision of the United States Supreme Court in *Alexander v. United States*, 1906, 201 U. S. 117, 50 L ed. 686, in which the Court denied review of certain orders of the lower Court directing witnesses to answer questions put to them. Speaking for the Court, Mr. Justice McKenna, cited the following language of Circuit Judge Van Devanter in *Nelson v. U. S.*, 201 U. S. 92, 50 L. Ed. 673:

> "I am of opinion that the mere direction of the Court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling, or order in the principal suit. . . ."

The opinion of the Court below and the authorities therein cited are a full answer to petitioner.

IV

The Circuit Court of Appeals in Effect Did Entertain the Petitioners Appeal on the Ground that the Same Was in Effect An Injunction.

The Honorable Judges of the Court below are not so naive as petitioner would have this Court believe. Had the Court below been of the opinion that there was any merit in petitioner's contention that the order appealed from was an injunction, certainly they would have entertained the appeal on that ground. In citing the case of *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176——S. Ct.——, 99 L. Ed 171, the Court demonstrated that it was acquainted with the statute which allows appeals from injunctions.

The Rule to Show Cause, if an injunction in the sense of the use of the word in Sec. 1292 of Title 28, U. S. C., which respondent respectfully submits it was not, was by law dissolved ten days after its issuance, for admittedly it was issued without notice. See Rule 65 of the Federal Rules of Civil Procedure. The reason Petitioner could not take the depositions was because of Respondent's motion under Rule 30 (b). It is obvious why the Judge declined to rule on the Petitioner's motion to dissolve the "injunction." It had expired.

V.

The Federal Courts lack jurisdiction, even if this Court is of the opinion that the Order and opinion appealed from is, in fact, appealable, and therefore the dismissal of the appeal is harmless.

While argument on the merits of the appeal may not be strictly germain to a petition for Writ of Certiorari or to a brief in opposition, respondent feels compelled to answer the argument on the merits contained in petitioner's petition.

The petitioner's contention is that the parents of the deceased are the real parties in interest and that, therefore, their citizenship controls and not that of the administrator. This question must be answered by the law of the State of South Carolina and not Kentucky or any other jurisdiction.

The point raised by Petitioner is not new. The leading case on the point is *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183, 76 L. Ed. 233, 52 S. Ct. 84, 77 A. L. R. 904. There a citizen of Oklahoma died as a result of injury alleged to have been caused through

the negligence of the defendant company. The widow of the deceased was appointed administratrix and instituted suit for damages under a statute that gives a right to such an action, and required it to be brought by an administrator. The cause was removed to the United States District Court, and the Court refused to grant a motion to remand. The administratrix then dismissed the action and subsequently *she* brought a second suit joining some other parties; and later a third suit was similarly brought. Both of these were removed to the United States District Court. Motions to remand were refused, and subsequently both the second and third were dismissed by the plaintiff. Thereupon her attorney had the widow resign as administratrix, and, at his request, the Court then appointed an administrator, Mecom, a resident and citizen of Louisana, of which state the defendant Fitzsimmons Company was also a citizen. A new suit by Mecom filed in the State Court was removed to the United States Court, it being alleged that there was fraud and collusion in having the non-resident administrator appointed so as to prevent removal to the Federal Court. A hearing was had at which it was proved that the motive for appointment was to obviate the diverse citizenship of the parties which had justified removal of the earlier suits, and that petitioner had, as a favor to the widow and her attorney, agreed to act as administrator.

The Circuit Court of Appeals for the Tenth Circuit (47 F. (2d) 28) had held inapplicable the well established doctrine that in Federal Courts the citizenship of an executor and administrator controls on the question of diversity of citizenship where the executor or administrator sues not for the benefit of the estate, but rather for the benefit of certain beneficiaries

among whom the proceeds must be divided. In doing so, the Circuit Court had likened the case to one where suit by the beneficiary is required to be brought in the name of a state, county or official body, although such nominal plaintiff had no interest in the result and was not permitted to control the litigation and to those cases where actions are brought by a next friend.

This Court in reversing the Circuit Court holding, stated:

> "The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here charged with the responsibilities for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiary, is determinative of federal jurisdiction. *This we think is the correct view. The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him.*" (Emphasis added).

In support of its decision, this Court cited the case of *Mexican C. R. Co., v. Eckmon*, 187 U. S. 429, 47 L. Ed. 245, 23 S. Ct. 211, and held that the rule there laid down was controlling.

This Court furthermore held the rule applicable in cases of suits by administrators to recover for death by wrongful act, whether the status provides that the amount recovered be for certain relatives of the decedent or be general assests of the estate. Citing *Harper v. Norfolk & W. R. Co.*, 36 Fed. 102, from the Fourth Circuit and others.

Thus, this Court has rejected the exact contention now being urged by Petitioner.

The *Mecom* case, *supra*, went a step further and held that the motive in appointing the administrator even if to avoid federal jurisdiction was immaterial.

The wording of one of the statutes involved in the *Mecom* case, *supra*, as supplied by counsel for the respondent therein was as follows:

> "Section 825: In all cases where the residence of the parties whose death has been caused as set forth in the preceeding section, is at the time of his death in any other state or territory, or when being a resident of this state, no personal representative is or has been appointed, the action provided for in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased"
>
> Oklahoma Compiled Statute, 1921, Section 825.

Therefore, it can be seen at a glance that there would have been more reason for this Court in the *Mecom* case to go along with the defendant's contention because under the Oklahoma statute the widow herself could have brought the action in her own name if no personal representative had been appointed.

The Mecom case has been followed in other jurisdictions. (See Annotations following the Mecom case in 77 A. L. R. 910).

The first case in the District Courts of South Carolina touching on the question involved is that of *Coburn v. Coleman*, 75 F. Supp. 107. In that case a foreign administrator, without qualifying in South Carolina, brought an action in the District Court and defendant moved to dismiss on the ground that she

had no authority to sue in South Carolina Courts. In granting the motion, the Court said:

> "An administrator suing for damages for wrongful death is not a mere nominal party, but the real party whose citizenship and not that of the beneficiaries controls the question of federal jurisdiction. Harper v. Norfolk & W. R. Co., C. C. Va. 1887, 36 F. 102."

The next case is that of *Sisk v. Pressley*, 81 F. Supp. 16, where the action was for wrongful death. Plaintiff brought the action as administrator for the benefit of the parents of the deceased, just as in the present case. The defendant raised a contention that the citizenship of the parents controlled because the plaintiff was a nominal party, and that the real parties in interest were the parents. In rejecting the defendant's contention, the Court said:

> "This action is required to be brought by the administrator. It can be enforced only by him. In re Estate Mayo, 60 S. C. 401, 38 S. E. 634 54 L. R. A. 660. The administrator in this case is charged with the responsibility of the conduct, or settlement, of this suit, and the distribution of its proceeds to the persons entitled thereto under the statute. If he succeeds in this action and collects the money from the defendants and fails to pay the same to the parties entitled thereto, he is liable on his official bond therefor. Boyd v. Ritchie, 159 S. C. 55, 155 S. E. 844. He has the exclusive right to employ counsel to represent him in such action. He is in no sense a public officer. The bond given by the administrator covers properly the performance of any duty imposed upon him by statute at the time of his qualification as administrator. For the foregoing reasons, his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. Mecom v. Fitzsimmons Co.,

284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904."

* * *

"The removing defendant's contention is fully answered by paraphrasing the words of the Supreme Court in the Mecom case, supra, as follows: The case comes to no more than this: There being, under South Carolina law, a right to have a non-resident appointed administrator, the parties in interest lawfully applied to a Probate Court in South Carolina, and plaintiff was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as the defendants, there is no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship."

Next in *Breeden v. Atlantic Coast Line Railroad Company*, 86 F. Supp. 964, where a citizen of Virginia was appointed in South Carolina as administrator and brought the action for wrongful death, the Court held that the pertinent Statutes of South Carolina provide that such actions shall be brought by or in the name of the executor or administrator of the deceased person and remanded the action to the State Court from which it had been removed holding that the citizenship of the administrator controlled. As an additional reason for so holding, the Court cited Rule 17 of the Federal Rules of Civil Procedure, which provides that every action should be prosecuted in the name of the real party in interest, but an executor or administrator may sue in his own name without joining with him the party for whose benefit the action is brought.

And in *Mason v. Helms*, 97 F. Supp 312, the District Court again rejected the contention there made that the administrator was only a nominal party and that the citizenship of the beneficiary should control. The Court said:

> "The South Carolina Statutes above referred to (Sections 10-1951 and 10-1952, 1952 Code of Laws, State of South Carolina), make it *mandatory* that suit be by or in the name of the administrator."

It is clear that the District Court in the cases cited above reached the correct decision as illustrated by the following case from South Carolina.

In the early case of *Edgar v. Costello*, 14 S. C. 20, a father brought an action to recover damages caused by the immediate death of his minor child. There was no allegation in the complaint that the plaintiff had sustained any damage by reason of the loss of the services of his child or by reason of any expense or outlay to which he was thereby subjected. The damages were claimed simply for the killing of the child. A motion for nonsuit was made and granted on the ground that under the statute (which is substantially the same as the present statute) the action could only be maintained by the executor or administrator of the deceased. The Court reached the conclusion that the lower court had been correct in granting the nonsuit. In reaching this conclusion the Court said that if the father were entitled to bring the action the defendant would be subjected to a double liability because the administrator could also bring the action.

In Re Mayo's Estate, 60 S. C. 401, 38 S. E. 634: Plaintiff was appointed administrator of the estate of Mayo by the Probate Court of Florence County,

and as such brought an action under the wrongful death act for the death of his intestate, who was at the time of this death a resident of the State of Florida. The Railroad Company moved in the Probate Court to revoke the Letters which had been granted to plaintiff on the ground that the Probate Court was without jurisdiction because of the Florida residence of the deceased at the time of his death and because he owned no estate in South Carolina for administration. The matter was appealed to the Circuit Court, which affirmed an order of the Probate Court refusing to revoke the Letters, and it was from the order of the Circuit Court that the Railroad Company appealed to the Supreme Court of South Carolina. In reaching its conclusion that an action for wrongful death was sufficient to support the grant of Letters of Administration by the Probate Court of South Carolina, the Court said:

> "On the other question (whether or not the right of action was sufficient property to authorize the appointment of administrator), we agree with the Circuit Court that the right of action under the statute being enforceable *only* by the administrator of the intestate, was warrant for the grant of administration by the Probate Court of Florence County where the intestate was killed . . . " (Emphasis added).
>
> * * *
>
> "But, in view of the statute under consideration, a broader signification ought to be given to the term 'assets,' so as to include any right of action which *cannot be enforced except by the administrator*, and which is made distributable by the administrator under statutory directions." (Emphasis added).
>
> * * *
>
> "We therefore hold that *the statute creating a right of action which cannot be enforced except*

> *by an administrator*, and providing for a special distribution by said administrator of the proceeds will warrant the probate court of the county where the intestate was killed in granting administration for the purpose of enforcing such right of action." (Emphasis added).

In *Southern Ry Co. v. Moore*, 158 S. C. 446, 155 S. E. 740, the Court held:

> "There is no question that the suit (for wrongful death) can be brought only by the personal representative of the deceased. American Railway Co. v. Didricken, 227 U. S. 147, 33 S. Ct. 224, 57 L. Ed. 456; Missouri, K. & T. Railway Co. v. Wulf, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134."

In *Boyd v. Richie*, 159 S. C. 55, 155 S. E. 844, the action was brought on a surety bond given by an administratrix at the time of her appointment. The deceased had been wrongfully killed and his widow, Matilda Boyd, administered on the estate and was required to post a bond in the sum of $100.00 which was signed by L. A. Richie, the defendant in the present case. She brought an action and the jury returned a verdict: "We find for the plaintiff $2,227.27, of which we apportion $484.92 for the benefit of Allen Boyd. . . ." Allen was a minor at the time of the action, and upon reaching his majority, brought the instant case against the defendant Richie as surety, alleging that the money had been paid to his mother, the administratrix, but that he had never received any part thereof, the administratrix in the mean time having died, leaving no estate. The lower court sustained a demurrer on the ground that the money apportioned to the present plaintiff was not a part of the estate of his father, and any misappropriation by the administratrix would not be a violation of the

condition of the bond as to make Richie, as surety, liable. The Court in reaching the conclusion that the bond of the administrator was liable said:

> "While Matilda Boyd was appointed administratrix of the estate of Jason Boyd, in that capacity, nevertheless, she was made by law trustee of the estate of the minor, Allen Boyd, coming into her hands as a result of the action brought by her under the statute as such administratrix. Certainly, with regard to that fund, either in its collection or disbursement, she could not and did not act in the capacity of a private citizen, for as such she had no authority to act in the matter and officially it is evident that she could only act as administratrix."

The Court further went on to say that it was influenced in making its conclusion by an examination and comparison of what is now Section 19-431 and Section 19-433 of the 1952 Code. The first relates to the oath required of an administrator and the latter to his bond, and what is now Section 10-1951, 10-1952 and 10-1954 of the 1952 Code of Laws, State of South Carolina, relating to civil actions for wrongful death. The statutes relating to the administrator's oath and bond were first enacted in 1712 and amended in 1789. Lord Campbell's Act was originally adopted in 1859. When Lord Campbell's Act was passed, a new duty was imposed upon an administrator and his bond covered the performance of any duty imposed on him by statute. The Court went further to say that what is now Section 10-1955 also bears indirectly upon the matter because it is there provided that the administrator shall be liable under what are now Sections 10-1951, 10-1952, 10-1954 of the 1952 Code of Laws, State of South Carolina, for costs of the Court "in case there be a verdict for the defendant or a nonsuit or a discontinuance out of the goods,

chattels and lands of the testator, or intestate, if any." The Court then reversed the lower court and sent the case back for trial.

These holdings have not been reversed by the recent case of *Bailes v. Southern Ry. Co.* —S. C.—, 87 S. E. (2d) 481. There a fraudulent scheme had been entered into between the administrator and the wrongdoer. The plaintiff, an heir, was allowed to sue the original wrongdoer and the administrator in her individual capacity, the original wrongdoer for the original wrong and the administrator for his fraud in failing to properly carry out his duties as administrator. It was a case of necessity and one which has long been sanctioned by the Courts for where a necessary party plaintiff fails to join in a suit he can be made a defendant.

Even the North Carolina Court in the case of *Evans v. Morrow, et al*, 234 N. C. 600, 68 S. E. (2d.) 258, reached the conclusion that an administrator in South Carolina is the only person who can enforce an action for wrongful death.

In *Bussey v. Charleston & W. C. Railway Company*, 73 S. C. 215, 53 S. E. 165, a wrongful death action was brought by the widow in her individual capacity in South Carolina. The defendant demurred on the ground that there was a defect in the party plaintiff in that the action should be brought by the administrator under South Carolina law (1952 Code, Section 10-1952) even though the Georgia Code allowed the widow to sue. The Court sustained the demurrer holding that she would have to bring the action as administratrix.

Section 19-482 of the 1952 Code of Laws for the State of South Carolina clearly gives authority to an administrator to settle and compromise any claims

which the administrator might have under the terms of Section 10-1951 to 10-1956. Said section reads as follows:

> **"19-482. Administrators, Etc., May Compromise Demands.**
>
> All administrators and executors may, by and with the consent of the probate judge, compromise all demands coming into their hands as such when the same are appraised doubtful and worthless and when such compromises are made, they shall be fully shown in the annual returns of such administrators or executors. And with the approval of the judge of probate and counsel representing such administrators or executors they may compromise and settle claims and actions for wrongful death asserted or brought under Secs. 10-1951 to 10-1956, all claims and actions based on causes of action surviving to such administrators and executors under Sec. 10-200 and all claims and causes of action for conscious pain and suffering and for wrongful death of employees of common carriers by railroad asserted and brought under Secs. 58-1231 to 58-1239 and under the act of the Congress of the United States, known as the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59)."

From the foregoing case and statutory law of South Carolina, it is conclusively shown that the District Court in *Sisk v. Pressley*, supra, was correct when it reached the conclusion that in South Carolina, just as in Oklahoma, the administrator is the real party in interest and that, therefore, his citizenship controls on the question of federal jurisdiction.

In South Carolina, even more so than in Oklahoma, the administrator must bring the action. The Oklahoma statute in effect at the time of the *Mecom* case, supra, provided that the action could be brought by the widow if no personal representative had been

appointed. However, the law of South Carolina makes no such provision, and the administrator in South Carolina is the only person who can bring the action. In South Carolina he is also charged with the responsibility for the conduct and settlement of such suits, and the distribution of its proceeds to the persons entitled under the statute, and he is liable upon his official bond for failure to act with diligence.

The same conclusion has been reached in other federal courts. See *Minnehaha Co.* (S. D.) v. Kelly 150 Federal (2d) 356, CCA 8th, 1945; *Okerman v. Wise*, 202 Federal (2d) 144, CCA 6, 1953; *O'Donnell v. Hayden Truck Lines*, 61 F. Supp. 823, D. C. Conn. 1945; *Jaffe v. Philadelphia & Western R. Co.*, 80 F. Supp. 416, D. C. E. D. Penn. 1948.

Professor Moore in discussing Rule 17 (a) of the Federal Rules of Civil Procedure said:

> "Those within the enumeration are real parties in interest. The . . . administrator . . . is the proper party plaintiff in the Courts held within the State of his appointment." Moore's Federal Practice, Second Edition, Volume 3, Section 17. 12, Page 1365.

This clearly illustrates that in Federal Court, an administrator is taken to be the real party in interest and it necessarily follows that his citizenship controls on the question of federal jurisdiction.

Under the substantive law of the State of South Carolina, the administrator has the right of action, and is the real party in interest, nor has Oklahoma changed its law since *Mecom*, supra.

In *Fenton, Adm'r v. Sinclair Oil Refining Company* (Okla. Cas.) No. 36, 289, filed 2-23-55.—Okla—,—P. (2nd) —4 C. C. H., Neg. Cases (2nd) 605, Oklahoma

did not decide that the beneficiaries under the Oklahoma death statute were the real parties in interest. The case holds that where an action is brought in Oklahoma for a wrongful death that occurred in another jurisdiction (Kentucky) and under the law of that jurisdiction, the beneficiaries are the real party in interest, the Oklahoma statute of limitations will apply as the action is not between non-residents within the terms of an Oklahoma statute reading:

> "Where the cause of action has arisen in another state or country, between non-residents of this state, and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of a lapse of time, no action can be maintained thereon in this state; . . ." Tit. 12, O. S. 1951, Sec. 99.

CONCLUSION

Upon the foregoing authorities and for the reasons hereinabove set forth, respondent respectfully submits that the petition for certiorari be refused, together with costs and damages for delay in accordance with Section 4 of Rule 56 of this Honorable Court.

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 221

CAROLINA POWER AND LIGHT COMPANY, A CORPORATION

Petitioner

vs.

R. R. JERNIGAN, ADMINISTRATOR OF THE ESTATE OF HAYMIE WARREN, DECEASED,

Respondent

Reply of Petitioner to Brief of Respondent

Petitioner begs leave to reply to Respondent's Brief, as set forth below.

NOTE: The opinion and decree of the Court of Appeals sought to be reviewed has now been published in the Aug. 8, 1955 issue of Federal Reporter Advance Sheets, and cited as 222 F. 2nd. 951. The editor's statement at the head of the opinion there printed erroneously states that the action was originally instituted in a North Carolina Court. That should be corrected to read, South Carolina.

I. Statements of Respondent Controverted

To avoid the possibility that silence may be regarded as an admission of their correctness the Petitioner regards it as advisable to controvert certain statements contained in the Respondent's brief, as follows:

1. Respondent seeks to make it appear to this court that the sole purpose in taking the depositions in question

was to obtain evidence for use at the trial of the case on its merits and not for the purpose of establishing federal jurisdiction. To this end Respondent makes reference to the affidavit of A. Y. Arledge and says that such affidavit states "that the purpose of taking the deposition was to obtain evidence for use in the trial of the case on its merits" (p. 7 lines 14, 15). (See also to same effect 2nd and 3rd paragraphs under heading "Statement of Facts", Respondent's Brief page 9).

This statement of Respondent is only a half truth. It omits reference to the fact, as stated in said affidavit of A. Y. Arledge, and in the affidavit of T. Dudley Paulling, and in the motion to dissolve the injunction, that the primary purpose of taking the depositions was to discover and obtain evidence for use in establishing federal jurisdiction at the hearing of the motion for remand, and that the purpose of Petitioner to extend the examination of these witnesses to discovering what, if anything, they might know of the facts concerning the injury was merely incidental and was sought to be done in the interest of minimizing trouble and expense of again examining the witnesses on the latter subject. We cite the record as follows:

Paragraph 3 of Petitioner's motion to dissolve the restraining order (beginning last line of page 34 Appx.) says: "The purpose of taking the deposition of said persons *is to ascertain facts essential to determining the jurisdiction of this court,* and, in order to ascertain such facts, defendant is merely making use of the Rules of this court designed and intended for such purpose, and it may, and likely will, become necessary to take the depositions of other persons for said purpose."

The affidavit of T. Dudley Paulling, of counsel for Petitioner (Appx. 36) says:

> "* * * That affiant is of the opinion that the persons whose depositions are proposed to be taken are in possession of facts which are material to the issue of removability, and which are not otherwise available to the

defendant except by examining said persons under oath as to such facts, and as to the identity of other persons who are or may be in possession of facts pertinent to such issue.

"Affiant further states that the defendant cannot properly or adequately prepare its defense to said motion to remand in time to be ready for the hearing thereof set for March 14, 1955, if said restraining order is kept in force for the reason that if this restraining order should be dissolved at the hearing on March 7th, 1955, there would still not be sufficient time to give the witnesses reasonable notice to again appear at a time and place for the taking of such depositions and to transcribe and file the testimony, by March 14, the time for hearing on the motion to remand, nor, would there be time to take the deposition of other persons who may be discovered upon the examination of these witnesses as having knowledge of facts pertinent to the question of removability."

A party is not required under the discovery provisions of the Federal Rules of Civil Procedure to state in the notice the purpose or scope of the intended examination *Madison v. Cobb* 29 F. S. 881. However, the court, on application of the opposing party may limit the scope of the examination. Rule 30(b). The Respondent's motion made under Rule 30(b) among other things requested the court "for an order limiting the scope of examination to such matters as may appear to the court * * * to be just and reasonable", etc. (Appx. page 27 lines 11, 12, 13). This put the question of the scope of the examination in issue. In order to make a full and fair disclosure to the court on that subject the Petitioner stated its desire to extend the examination to discovering information as to the whereabouts of the well pipe which the deceased was handling. To this end facts were stated to show the Petitioner's unsuccessful effort to procure information as to said pipe by other means, and said Arledge affidavit concluded with this candid statement:

"In minimizing the trouble and expense of conducting its defense in this action affiant, and his associate counsel, desire to *extend* their examination of said witnesses to that of eliciting information from said witnesses as to any knowledge which they have as to the facts involving the death of Haymie Warren including the disposition or whereabouts of said pipe, *in addition to their primary purpose of obtaining information in support of defendant's petition for removal.*"

In the light of the foregoing the implications contained in the Respondent's brief to the effect that the sole purpose of taking the depositions was to prepare for the defense on the merits are not justified. Petitioner recognizes that upon objection from Respondent the court could, if he thought justice required, limit the taking of depositions at this stage to discovering facts directed solely to federal jurisdiction. It is the refusal of the judge to permit the taking of depositions on the question of jurisdiction which formed the basis of this appeal. Petitioner is not contending that it was denied a right, at this stage, to discover and acquire evidence touching the merits.

2. Under topic I of the heading, "REASONS FOR NOT GRANTING WRIT", (pages 10, 11, 12) Respondent makes two charges which are baseless.

The first such statement is to the effect that this Petitioner is not acting in good faith in its effort to remove this case, but its motive, including the appeal and this petition, is solely to delay a trial on the merits. That statement is denied.

This Petitioner is endeavoring in good faith to secure the right, which it believes it has under the provisions of the Constitution and the statutes fixing the jurisdiction of federal courts, to defend this action on the merits in a court of federal jurisdiction. And it is emphatically stated that neither the right thus sought, nor the grounds upon which that right is sought, are regarded by Petitioner as

trivial, nor are they pursued in any but the utmost good faith.

Furthermore, if there has been delay in obtaining relief the Respondent is in no position to complain. The accident occurred August 5, 1952 (Appx. 14), and suit was not instituted until November 6, 1954 (Appx. 9). The Petitioner filed its removal proceedings on November 23, 1954 (Appx. page 34, par. 3), and the Respondent did not file a motion for remand until February 18, 1955, and apparently filed it then only to avoid the case being set for trial. (Appx. 35, par. 3). In such circumstances it hardly lies in the mouth of Respondent to make the stock cry of delay. Stated pointedly, what the Petitioner seeks is to avoid the adverse consequences of prejudices and injustices incident to a trial in the State court, and the Respondent wants to enjoy the advantages of such prejudices and injustices. If Petitioner's effort to accomplish such purpose works a delay that should not be laid at the Petitioner's door, nor should it otherwise be treated as a ground for exercising a discretion against a review.

The second such statement is "that both District Judges involved offered to treat the allegations of Petitioner's petition for removal as true in passing upon Respondent's motion to remand, yet Petitioner in both instances refused to have it so treated." (Resp. Br. top page 11). At top of page 12 substantially the same statement again appears. These statements incorporate matters outside of the record, thereby necessitating our going outside of the record to reply. We would not reply except for a feeling of necessity to counteract the prejudicial effect such statement might have if it should go unanswered.

No such proposition was made. Why should it have been made? The motion to remand was not before Judge Williams. So what motive could he have had for making such a proposal? And, to what avail could he have made it? Nor was there a hearing on the motion to remand before Judge Hoffman. The appeal from Judge Williams' order

was taken prior to the date scheduled for the hearing before Judge Hoffman. The appeal suspended further jurisdiction of the District Judge to hear the motion to remand, or for any other purpose not in aid of the appeal. It is true that counsel for both parties appeared before Judge Hoffman, pursuant to the previous setting of the hearing, and, as Respondent states at top of page 8 of his brief, everybody conceded that the appeal suspended any further proceedings on the motion to remand pending the appeal, and for that reason it was not heard. So, why would Judge Hoffman make any such proposition? He knew he could not, and that he did not, hear or rule on the motion. Also, the Respondent noticeably avoids saying in his brief that he consented then, or consents now, that the court might find or treat the facts to be as alleged in the petition. Respondent traversed those basic facts (see Traverse Appx. 23), and certainly a judge could not treat traversed facts as true in the absence of proof by Petitioner on a duly constituted hearing, or in the absence of an admission of their truth by Respondent.

Of course, on the question of whether the removal petition alleges prima facie grounds for removal the facts alleged must be treated as true; this, however, is not because of any offer of the judge to do so, but because the law requires it. But that is another matter, and is not what Respondent's brief seeks to impress upon the court. Respondent's brief says the judges proposed to treat the allegations as true *on the motion to remand,* and, in charging that Petitioner is trifling with the court in order to secure delay, says that the petitioner rejected the proposition. That is a prejudicial statement made without support either by the record or by facts *dehors* the record, and, of course, should not be considered.

II. Authorities Cited Do Not Apply

The Petitioner, at pages 21 and 22 of its petition, tried to make clear *the point which distinguishes* the cases cited in the opinion of the Court of Appeals from this case. That

distinction lies in the fact that none of those cases involved a situation where the order, held to be unappealable, was one which finally adjudicated, or which prevented the preparation for a hearing out of which there was issued a final order, that the court had no jurisdiction. The same distinction applies to each of the cases cited in Respondent's brief.

At the risk of being tedious, we wish to again call attention to the fact that in every case cited by the Court of Appeals in its opinion on the question of non-appealability because of the interlocutory nature of the order, and, also, every case cited by Respondent in his brief, such cited case was to be, or at least was jurisdictionally capable of ultimately being, tried to a final termination on the merits of the main controversy *in a federal court* so that, upon appeal from the final decree rendered on the merits *in a federal court,* the order therein held to be interlocutory and unappealable could be reviewed and the error, if any, corrected *by a federal court* along with a review of such final decree on the merits. *In none of those cases did the order which was held to be interlocutory deal with a ruling which ousted the court's jurisdiction of the main controversy, thereby rendering it impossible for the order to be later reviewed* along with the final decree on the merits.

In our case, however, the order appealed from, while it deals with the denial of the right to take the depositions such denial, unless reviewed and reversed, *will necessarily result in ousting the jurisdiction of the federal court* to entertain the main controversy to its final termination. The reason is that a remand order will necessarily have to issue at the hearing upon failure of factual proof, or because of Judge Williams' ruling becoming the law of the case, thereby resulting in the loss *forever* of the right to have the alleged error of Judge Williams' order reviewed *by a federal court*—the only court which has the power to give relief therefrom. If the case goes back to the state court, in consequence of error complained of in Judge Williams' order, *then such error can never be reviewed, because the state court is not concerned with such error and has no*

jurisdiction to review it. Thus the petitioner will have been *finally* deprived of the right to a hearing according to the usual procedure before the judge who had jurisdiction of the motion to remand.

We would set out a synopsis of each case cited on this question of appealability by the opinion of the Court of Appeals and by Respondent's brief in support of our above stated point of distinction, but for the admonition to be brief. After all, such a synopsis would not suffice for an examination of those cases by the court.

It has been said that the "right to a judgment from more than one court is a matter of grace, and not a necessary ingredient of justice." *(Cobbledick v. U. S., 309 U. S. 323,* 60 S. Ct. 540, *84 L. Ed. 783).* The basic philosophy upon which our federal system of government was established is one which regards the security of personal rights to be paramount. It provided, at the pains of slow motion, a system of "checks and balances" in its determination to make sure that no person is deprived of his rights by the act or judgment of one man, or by a group of men composing an authoritative agency, without being subject to review by other men composing some other form of governmental authority. It may be stated as a truism, embedded in the framework of our system and designed to assure equal justice by law, that this matter *of grace*—in the form of a review—is *the grace of the law,* rather than *the grace of men* in positions of authority created by the law. Such grace is the product of a basic principle and is not a special act of beneficience. So, it must be, as indeed it has been, said that when an inferior court issues an order which finally and irreparably takes away a substantial right in such way that it cannot be reviewed and restored at a time and in a manner to provide effective relief from the wrong, such order, by virtue of that fact, becomes final in its nature and is reviewable by the appropriate court of review. This is the spirit of the law which gave life and substance to *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528, and the line of cases on

which it rests, cited in the Petition at page 17. A review of such an order may be legitimately denied only as to such cases and in such instances as are specifically prescribed by statute, which means that only the Congress has the power to take away the right of review. (However, it is not conceded that Congress can exercise such power in a way which results in the loss of some other right guaranteed by the Constitution which cannot be restored except by a review). As has been pointed out in the Petition, page 11, the statute (28 USC 1447 d) which prevents a review is limited solely to *an order of remand* and *does not apply* to an order, such as this, which denies to a party litigant the use of the usual procedures for obtaining a full and fair *hearing* on the motion to remand. That statute does not prevent the review of an order of remand granted by a Court of Appeals. *Gay v. Ruff,* 292 U. S. 25, 54 S. Ct. 608, 78 L. Ed. 1099. Nor does that statute, nor the principle of a review *by grace,* justify a refusal to review this order on the ground that it involves a procedural step in the course of undertaking to make preparation for a hearing before the proper judge at the scheduled time, upon which hearing it is to be determined whether an order of remand will or will not be granted.

Mr. Justice Frankfurter's language above quoted from *Cobbledick's* case was used in his statement of the principle that Congress has the authority to prescribe the element of *finality* of an order as the basis of the right of review, early enacted into the Judicial Code, and he says that it "has been departed *from only when observance of it would practically defeat the right of any review at all.*" This statement is in recognition of the point we strive to make, namely, that it is a basic principle in our system that a review will always be made at an appropriate time to prevent the irretrievable loss of a substantial right. Applying that principle to our case, it becomes clear that the contested order must be reviewed now or the wrong can never be reviewed and rectified.

III. Supplemental Authorities

In support of Petitioner's position that the Mecom case is at variance with other decisions as to who is the *real party in interest* for determining various legal rights of litigants we beg leave to call to the court's attention another line of authority developed in applying the doctrine of *res judicata.*

The general rule, of course, is that an adjudication in an action is binding only on the record parties and their privies, however, there is a well recognized exception which extends the doctrine to persons who are not parties of record, or privies of parties of record, but who exercised control over the action in furtherance of some interest of their own.

The rule is stated in RESTATEMENT OF JUDGMENTS, Sec. 84 as follows:

> A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.

30 A. J. (Sec. 277) p. 960 states it as follows:

> The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, pay-

ment of expenses or costs of the action, or doing of such other acts as are generally done by parties.

In *Minneapolis-Honeywell Regulation Company v. Thermoco* supra (116 F. (2) 845) Justice Learned Hand said:

> It has been settled doctrine in the Federal courts for at least seventy-five years that when a person not a party to an action takes over its defense, he may take advantage of the judgment if he wins, and he will be bound by it if he loses, exactly as though he were a party to the record.

The principle is made clear by the Illinois court in *Cheney v. Patton,* 144 Ill. 373, 34 N. E. 416, saying:

> No one can read it, (the testimony) without being forced to the conclusion that, from the filing of the bill to the final disposition of the case of *Patton v. Smith,* Smith was the merest figurehead, used by Cheney for the purpose of trying to avoid the Heaton foreclosure. No stronger case could be presented for the application of the just rule that the *real party in interest* to an action, whether so by name or not, is bound by the judgment. Freem. Judgm. (2d Ed) Secs. 174, 175; *Cheney v. Patton,* 134 Ill. 422; 25 N. E. Rep. 792 and cases there cited. (Emp. ad.)

> The question in every such case must be, was the party sought to be concluded the *real party* in the action pleaded in bar? And, if he was, whether the action was openly so conducted, or his connection therewith concealed, is immaterial; otherwise he who uses the name of another in which to prosecute a suit for the purpose of gaining some advantage over his adversary, would be given an advantage over one, who though not a party to a suit in name, is the party in interest openly, and for an honest purpose. (Emp. ad.)

Other cases where Federal courts have recognized as real parties in interest those who were not parties of record, but who controlled the litigation are as follows:

Caterpillar Tractor Co. v. Int. Harvester Co., 120 F. (2) 82, 139 A. L. R. 1; same case 32 F. S. 304; *Universal Oil Products Co. v. Winkler-Koch Eng. Co.* (D. C. Ill.) 27 F. S. 161 (Excellent opinion). *E. W. Bliss Co. v. Cold Metal Process Co.,* 1 F. R. D. 193.

This line of authority is cited as evidencing another instance in which parties, though not named as parties of record, who *control* litigation are considered to be the *real litigants.* If the unnamed parties who *control* litigation are the *real parties* to the litigation sufficiently to invoke the application of the doctrine of *res judicata,* then by analogy, as well as in obedience to the necessity of *uniformity in judicial reasoning,* it ought to be regarded as authority for the Petitioner's contention that if the statutory beneficiaries are actually *controlling* this action, as alleged, such control makes them the *real parties* litigant sufficiently to make their residence control on removability.

It is true that a decree in an action by the administrator in this case would undoubtedly be *res judicata* (were that the issue) as to the beneficiaries, because, if they did not control the litigation still the representative relationship between them would make the beneficiaries privies and bind them on that ground. But, the principle established by these authorities is that the adjudication is binding on persons who are not parties, and not privies of parties, *if they control, and solely because they control,* the action. It is the element of *control* which binds persons who are not parties or privies, and it binds them because the control makes them the *real parties litigant,* though the action is not in their name. If such control makes persons not named as parties the *real parties litigant* to the satisfaction of the doctrine of *res judicata,* why shouldn't control by the beneficiaries over the action in the name of the administrator be sufficient to satisfy the requirements of diversity of citizenship on the question of removal?

CONCLUSION

Over and beyond all of the other alleged error of this controverted order, there is the underlying basic question of the correctness of Mecom's case which ought to be corrected. If, as Respondent has undertaken to show, Mecom's case is not sustainable by sound logic, or if it is out of harmony with the underlying purpose of creating federal jurisdiction upon grounds of diversity of citizenship, or if it is at odds with that great body of judicial decisions which holds that a statutory trustee created to sue for damages in death cases is merely a *nominal party* and the statutory beneficiary is the *real party in interest,* then it would seem that this court has the duty (because the inferior courts cannot do so) to revise the Mecom case. If it is wrong in any of its aspects, which would control in this action, then it ought to be set straight before it becomes any further ingrained in our court decisions. The most inapt place for the indulgence of a legal wrong is in the decisions of a court of final resort. Chief Justice Bleckley graphically pointed this out in *Ellison v. Georgia R. R. & Banking Co.* 87 Ga. 691, 13 S. E. 809 as follows:

> Some courts live by correcting the errors of others and adhering to their own. On these terms courts of final review hold their existence. . . . With these exalted tribunals, who live only to judge the judges the rule of *stare decisis* is not only a cannon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad, and be discretely blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth. . . . Nevertheless, without serious detriment to the public or peril to themselves, they can and do admit *now and then, with cautious reserve, that they have made a mistake.* (Emphasis added.) Indeed, reversion to truth, in some rare instances, is highly necessary to their permanent well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured, to keep the type itself

respectable. . . . When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court—supreme in the majesty of duty as well as in the majesty of power,—is not *stare decisis* but *fiat justitia ruat coelum.*

Respectfully submitted,
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